Supreme Court, U.S.

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. and MARVIN GEISNESS,

Petitioners,

vs.

IRENE HALLIGAN, as Executrix of the Estate of THEODORE H. HALLIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether judicial review of arbitration awards under a standard allowing vacatur based on arbitrators' "manifest disregard of the law *or the evidence or both*" is consistent with the strong federal policy favoring arbitration, as embodied in the Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.*

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Piper Jaffray, Inc. (which is now known as U.S. Bancorp Piper Jaffray Inc.) hereby discloses that its corporate parent is U.S. Bancorp, which is a publicly traded corporation. Petitioner has no nonwholly owned subsidiaries.

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Piper Jaffray, Inc. and Marvin Geisness respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 148 F.3d 197 (2d Cir. 1998), and is reprinted at 1a-7a. The district court's opinions of April 14, June 10, and June 16, 1997 — respectively, denying Respondent's petition to vacate the arbitral award, granting Petitioners' cross-petition to confirm the award, and dismissing Respondent's Complaint on grounds of *res judicata* – are not reported and are set forth at 18a-40a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was issued on July 9, 1998. The court denied Petitioners' petition for rehearing or suggestion for rehearing in banc by order dated October 23, 1998. *See* 41a. This petition is being timely filed within 90 days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Respondent first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331 (because the case involved an alleged violation of a federal statute) and 1332 (because Respondent is a citizen of the State of New York, Petitioner Piper Jaffray, Inc. is a citizen of the States of Minnesota and Delaware, and Petitioner Marvin Geisness is a citizen of the State of Minnesota).

STATUTE INVOLVED

The Federal Arbitration Act, 9 U.S.C. §§ 1, *et seq.* That statute is reprinted in its entirety at 43a-54a.

STATEMENT OF THE CASE

This case arises out of an arbitration proceeding brought by Theodore Halligan ("Mr. Halligan"), a former salesperson of Petitioner Piper Jaffray, Inc., against Piper Jaffray and one of its employees, Petitioner Marvin Geisness (referred to collectively hereinafter as "Piper Jaffray" or "Petitioners"). In 1993, Mr. Halligan filed an arbitration claim with the National Association of Securities Dealers alleging, *inter alia*, that he was terminated because of his age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.* The arbitration lasted more than two years and was hotly contested. The hearings themselves, before a panel of three experienced attorney-arbitrators, lasted 26 days, during which 25 witnesses were examined and cross-examined (18 for Mr. Halligan, 9 for Piper Jaffray) and more than 240 exhibits were introduced. The parties presented opening and closing arguments and submitted post-hearing briefs. *See* 29a.

On October 9, 1995, during the pendency of the arbitration hearings, Mr. Halligan died. His widow and executrix, Irene Halligan ("Mrs. Halligan" or "Respondent"), continued the arbitration on the estate's behalf. On March 19, 1996, the arbitrators issued a written award denying all of Mr. Halligan's claims. Mrs. Halligan filed a petition to vacate the award on grounds, *inter alia*, that the arbitrators engaged in "manifest disregard of the law" in rejecting her husband's claims. Piper Jaffray both opposed the petition and cross-moved to confirm. Mrs. Halligan also commenced a federal court action solely against Piper Jaffray, alleging a violation of the ADEA based on her husband's alleged discharge. Piper Jaffray moved to dismiss the complaint.

In three separate written opinions issued in April and June 1997, the district court denied Mrs. Halligan's petition to vacate,

granted Piper Jaffray's motion to confirm, and, having issued those two decisions, dismissed Mrs. Halligan's ADEA complaint, which raised the identical claims that had been advanced in the arbitration, on grounds of *res judicata*. On July 9, 1998, a panel of the Second Circuit reversed all three of the district court's decisions. The basis of its holding was the court's conclusion that the arbitrators, who had ruled in favor of Piper Jaffray but without issuing a written explanation, had "manifestly disregarded the law or the evidence or both." *See* 16a. The court specifically noted that the arbitrators had been properly instructed as to the applicable standards of law governing Mr. Halligan's age discrimination claim. *See* 15a.

The court of appeals denied Piper Jaffray's petition for rehearing or suggestion for rehearing in banc on October 23, 1998.

REASONS FOR GRANTING THE WRIT

The standard of judicial review announced by the court of appeals — allowing vacatur of arbitral awards based on the arbitrators' "manifest disregard of the law *or the evidence or both*" — is unprecedented in the scores of reported federal appellate decisions reviewing arbitral awards under the FAA, and creates a regime of judicial review highly destabilizing to the arbitration process. The court's approach expands the focus of the "manifest disregard" standard beyond arbitrators' conclusions of law and into their findings of fact, albeit without the deference that characterizes appellate review of fact-finding by a court or jury. This case presents this Court with the opportunity to decide whether so intrusive a standard of review is consistent with the strong national policy favoring arbitration, as reflected in the FAA, and with the interests of efficiency and finality that arbitration promotes.

I.

THE COURT OF APPEALS ANNOUNCED A NEW STANDARD OF JUDICIAL REVIEW OF ARBITRAL AWARDS THAT CONFLICTS WITH THE DECISIONS OF EVERY OTHER COURT OF APPEALS

A. The "Manifest Disregard of the Law" Standard

In asking the district court to vacate the arbitrators' award in this case, Respondent argued, *inter alia*, that the arbitrators engaged in "manifest disregard of the law" when they rejected her husband's claims. The "manifest disregard of the law" standard, while not an explicit basis for judicial review under the FAA, is a clearly recognized ground for vacatur of arbitrators' decisions, pre-dating the enactment of the FAA and consistently adhered to ever since. *See First Options v. Kaplan*, 514 U.S. 938, 942 (1995) (noting that parties are "bound by [an] arbitrator's decision not in 'manifest disregard' of the law") (citing *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), *overruled on other grounds, Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)); *Wilko*, 346 U.S. at 436-37 ("the interpretations of the law by the arbitrators[,] in contrast to manifest disregard[,] are not subject, in the federal courts, to judicial review for error in interpretation").

Under this common law standard, judicial vacatur of awards is permitted only where the arbitrators consciously disregarded an applicable rule of *law*, in that they were made aware of the rule but chose not to apply it. The Second Circuit's prior articulation of the standard is both typical and widely followed: "The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Every other court

of appeals has adopted the same or a substantially similar approach. *See, e.g., Prudential-Bache Secs. v. Tanner*, 72 F.3d 234, 237-38 (1st Cir. 1995); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379 (3d Cir. 1995); *Gallus Invs., L.P. v. Pudgie's Famous Chicken, Ltd.*, 134 F.3d 231, 233-34 (4th Cir. 1998); *Trans Chem. Ltd. v. China Nat'l Mach. Import and Export Corp.*, 161 F.3d 314, 314 (5th Cir. 1998); *Glennon v. Dean Witter Reynolds, Inc.*, 83 F.3d 132, 135-36 (6th Cir. 1996); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 706 (7th Cir. 1994); *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 (8th Cir. 1998); *Barnes v. Logan*, 122 F.3d 820, 821-22 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1385 (1998); *U.S. Energy Corp. v. Nukem, Inc.*, Nos. 96-1532, 97-1332, 1998 WL 738336, *2-3 (10th Cir. Oct. 22, 1998); *Gianelli Money Purchase Plan and Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir.), *cert. denied*, 119 S. Ct. 540 (1998); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

The rationale behind this deferential approach lies in the judicial, and ultimately legislative, encouragement of arbitration as an alternative to litigation. As this Court declared in 1855:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end, of litigation.

Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1855). This Court, accordingly, has long made clear that courts reviewing arbitral awards "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact," nor do they "sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 38 (1987); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 n.4 (1991) ("judicial scrutiny of arbitration awards necessarily is limited") (quoting *Shearson*, 482 U.S. at 232); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("judicial review of an [arbitration] award is more limited than judicial review of a trial").[1]

An essential aspect of this approach to judicial review has been that the courts consider only whether there has been manifest disregard "of the law" and not "of the evidence." Because arbitration shifts only the forum for the resolution of a dispute, not the substantive law, *see, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only

1. The "manifest disregard" standard thus mirrors the extremely narrow statutory bases for judicial review contained in the FAA. Under section 10 of the statute, an award may be vacated only if it was "procured by corruption, fraud, or undue means"; if there was bias on the part of the arbitrators; if the arbitrators engaged in misconduct that prejudiced the rights of the parties, such as refusing to postpone the hearing for good cause; or if the arbitrators exceeded their powers. *See* 9 U.S.C. § 10(a). Under section 11, the court may modify an award if it reflects a material miscalculation of figures or a material mistake in its description of any person, thing or property; if the award is based on a matter not submitted to the arbitrators or "not affecting the merits of the decision"; or if it is "imperfect in matter of form not affecting the merits of the controversy." *Id.* § 11.

submits to their resolution in an arbitral, rather than a judicial, forum."), the very legitimacy of arbitration would be undermined if arbitrators were allowed to create their own law or to decline to apply law of which they were made aware. The "manifest disregard" standard ensures that courts serve as a watchdog over the arbitrators' legal conclusions (even though subject to a great degree of deference).

There is no corresponding rationale for judicial patrolling of arbitrators' *factual* findings. Reviewing courts have no special competence in that area; if anything, the opposite is true, since it is the arbitrators, as triers of fact, who see and hear the witnesses and have the unique ability to make the credibility judgments so essential to informed fact-finding. *See generally Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985) ("only the [factfinder] can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said").

This rationale has particular force in employment discrimination actions such as this case. As noted above, Mr. Halligan alleged that his employment with Piper Jaffray was terminated because of his age, in violation of the ADEA. While it is a relatively straightforward task to *state* the principles of law governing ADEA claims (and the court of appeals noted that the arbitrators had been properly instructed as to those principles here), it is quite another thing to *apply* them to specific factual circumstances and decide whether a given claimant has proven intentional discrimination by a preponderance of the evidence. That exercise is the unique province of fact-finders, who see and listen to the witnesses. *See generally Pullman-Standard Div. of Pullman, Inc. v. Swint*, 456 U.S. 273, 289 (1982) ("discriminatory intent is a finding of fact to be made by the trial court"); *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (summary disposition

disfavored in employment discrimination cases because "the employer's intent is in question"). As the D.C. Circuit has observed, the vast majority of employment discrimination claims "are entirely factual in nature and involve well-settled legal principles," a state of affairs that creates "no adverse impact on the arbitration process" precisely because judicial review of awards is limited to correcting errors of law and not fact. *See Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1487 (D.C. Cir. 1997).

B. The Court of Appeals Departed From the Unanimous View of Other Courts and Created a Split in the Circuits

The federal courts of appeals until now have been unanimous in following an approach that confines review under the "manifest disregard" standard to errors of *law*. They have thus held that, while courts can and must pay close attention to the *legal* underpinnings of arbitral awards, they do not sit to review the wisdom or accuracy of arbitrators' *factual* findings. *See, e.g., Cole*, 105 F.3d at 1487; *Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 150 (4th Cir. 1994) (no manifest disregard where "the arbitrators had substantial conflicting testimony which could support a decision for either of the parties . . . [and] the arbitrators may well have chosen to credit evidence presented by defendants"), *cert. denied*, 513 U.S. 1112 (1995); *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 990 F.2d 957, 961 (7th Cir. 1993) (courts must enforce awards "even in the face of erroneous findings of fact or misinterpretations of law") (citation omitted); *Denver & Rio Grande W. R.R. v. Union Pac. R.R.*, 119 F.3d 847, 849 (10th Cir. 1997) ("Errors in . . . the arbitrator's factual findings . . . do not justify review or reversal on the merits of the controversy."). The Second Circuit had previously adhered to this position as well. *See Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985) ("the fact that an arbitrator

erroneously decided the facts" is "not a ground for vacating an arbitrator's award") (citation omitted).

In this case, however, the Second Circuit conspicuously departed from that unanimity (and from its own prior rule). It altered the existing standard of judicial review to allow consideration of not only whether the arbitrators engaged in manifest disregard of the *law*, but whether they disregarded the law "*or the evidence or both*." In explaining its decision to vacate the arbitrators' award, the court said, in pertinent part, "we are inclined to hold that [the arbitrators] ignored the law or the evidence or both," 16a, later adding, "we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both," 17a.

This new approach — of reaching beyond the arbitrators' conclusions to examine the relative strengths of each party's position on the facts — is apparent not only in the words the court chose to explain its conclusions, but also in the analysis it used to reach that result. The court's opinion demonstrates inescapably that its decision was based entirely on its disagreement with the arbitrators' weighing of the evidence, not on any perceived refusal by the arbitrators to apply the law. Thus, the court justified its decision with repeated references to what it perceived as the strength of Respondent's case on the facts and the concomitant weaknesses in Petitioners'. It said, for example:

- "During the arbitration hearings, Halligan presented the arbitrators with *very strong evidence* of age-based discrimination."

4a (emphasis added).

- "Quite simply, Halligan presented *overwhelming evidence* that Piper's conduct after Tad Piper became CEO was motivated by age discrimination."

15a (emphasis added).

- "Halligan presented *powerful evidence* of his performance, in the form of quantitative sales rankings and relevant witness testimony."

15a (emphasis added).

- "[T]he circumstantial evidence surrounding his departure . . . is consistent *only* with a finding that Halligan was pushed out of his job."

15a (emphasis added). In addition, the court presented the facts in a manner that frequently overlooked Petitioners' version of events. On the few occasions when it did acknowledge the facts supporting the award, its statements were dismissive and laced with qualifications or disclaimers. *See, e.g.*, 5a ("All Piper personnel denied having made such [age-based] statements, although their testimony was occasionally inconsistent or ambiguous."); 6a (twice describing Piper Jaffray as merely "discount[ing]" Mr. Halligan's evidence rather than as presenting evidence of its own).

Moreover, the court of appeals specifically acknowledged that the arbitrators had been properly advised as to the *legal* standards applicable to Respondent's claim of age discrimination. *See* 15a. The only possible reading of the court's opinion, therefore, is that it created and applied a standard of heightened inquiry into the *factual* underpinnings of arbitral awards. Indeed, despite the parties' straightforward

legal contentions before the arbitrators, there was intense factual disagreement on virtually every material point, including matters as rudimentary as whether Mr. Halligan was fired or voluntarily retired. *See* 15a. Because of this conflicting testimony, the arbitrators were left to decide matters that turned on their assessment of the witnesses' credibility.

Yet the Second Circuit, believing that the arbitrators resolved those factual issues incorrectly, used that disagreement as the basis for vacatur under a "manifest disregard" analysis, thereby assuming for itself a task of fact-finding that has heretofcre been the exclusive province of the arbitrators. Its approach was not even as deferential as a court's review of jury verdicts, in that it resolved every material factual dispute in a manner opposed to, rather than in favor of, the arbitrators' award. *Cf. Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944) (reviewing court must defer to jury's verdict and resolve all factual inferences in favor of it). In so expanding the "manifest disregard" standard, the court placed itself at odds with every other court of appeals that has applied that standard to date.

II.

THE ISSUES PRESENTED BY THIS CASE ARE OF GREAT IMPORTANCE

By articulating a new "manifest disregard of the evidence" standard, the court of appeals called into question the entire, previously well settled area of judicial review of arbitration awards. The decision's effects will ripple throughout *all* arbitrations — not only in employment cases, not only in cases raising statutory claims for relief, and not only in the securities industry. This case is thus of national significance and warrants issuance of a writ of *certiorari*.

In the collective bargaining arena, review of arbitration awards is severely limited in order to foster the national policy favoring "private settlement of labor disputes without the intervention of government." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37 (1987). As this Court has explained:

> Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Id. at 37-38. This is especially true with respect to arbitral fact-finding, which is almost entirely insulated from judicial second-guessing. *See id.* at 39 ("improvident, even silly, factfinding" is "hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts").

Until now, the same approach has applied outside collective bargaining, where the rationale for limited judicial review is not the goal of labor peace but the strong national policy favoring arbitration, as embodied in the FAA.[2] This Court has repeatedly observed that the FAA "establishes a 'federal policy favoring arbitration.' " *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (in enacting the FAA, "Congress declared a national policy

2. This Court in *Misco* noted the similarity between judicial review under the FAA and judicial review in the collective-bargaining arena. *See* 484 U.S. at 40-41.

favoring arbitration"); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510-11 (1974) (FAA was enacted in part "to allow parties to avoid 'the costliness and delays of litigation' ") (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1, 2 (1924)).

Just as permissive judicial review of collective-bargaining arbitration awards would be inconsistent with the national policy favoring arbitration as a means of promoting industrial harmony, so too is judicial review under a "manifest disregard of the evidence" standard sharply at odds with the pro-arbitration objective of the FAA. Rather than signaling the end of a dispute, an arbitral award that is subject to virtually *de novo* scrutiny for factual errors will in reality be just the beginning. "[P]lenary review by a court of the merits [of an arbitration award] would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final." *United Steelworkers of Am. v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599 (1960). An article cited by this Court in *Wilko* — the case in which this Court first explicitly acknowledged the "manifest disregard of the law" standard and which involved a statutory claim for relief — made the point this way:

> A practice of liberal review thus tends to increase the workload of the courts; not only will cases be transferred from arbitral to judicial tribunals, but also the parties will tend to resort to the courts originally because they will wish to avoid the extra step of an arbitration proceeding.

Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARVARD L. REV. 681, 681-82 (1950) (cited in *Wilko*, 346 U.S. at 437 n.24); *see also Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993) (narrow judicial review preserves the "twin goals of arbitration": "settling disputes

efficiently and avoiding long and expensive litigation."); Jose A. Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, 70 N.Y. ST. BAR J. 22, 23 (Mar./Apr. 1998) ("Everyone understands that the many advantages of arbitration would quickly evaporate if arbitration proceedings were treated as mere pre-trial hearings-warm-ups for the parties' day in court.").

The facts of this case perhaps best illustrate the deleterious effects of the Second Circuit's ruling. All of arbitration's supposed advantages over litigation — expedition, efficiency, informality — appear hollow in light of this decision. After 26 hearing days, dozens of witnesses and hundreds of exhibits, the court of appeals has effectively ordered the parties to start over and try this case anew. Indeed, the parties are now back before the district court, preparing to begin discovery with respect to the follow-up complaint brought by Respondent's estate through his widow-executrix.[3]

Moreover, the factual errors identified by the court of appeals were not on matters that were uncontested at the arbitration or otherwise "provable" one way or the other. Here, the errors related to the ultimate factual issue: whether Petitioners intentionally discriminated against Mr. Halligan. While there was evidence on this record that, if believed, could have led a reasonable factfinder to conclude that Petitioners had done so, there was also abundant evidence in this vigorously contested arbitration that both contradicted Respondent's position on every point and that affirmatively supported Petitioners. Against this background, the court's application

3. The follow-up complaint asserts the identical claims as were asserted in the arbitration proceedings, albeit against Petitioner Piper Jaffray only. On December 24, 1998, Piper Jaffray served a motion to dismiss the complaint on various grounds or alternatively to compel arbitration. That motion has not yet been decided.

of the new "manifest disregard of the evidence" standard leads to a patently absurd result — suggesting as it does that the evidence in this case was susceptible of only one interpretation, and that the three experienced attorney-arbitrators who actually saw and heard the witnesses somehow erred grievously in coming out the other way. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

More broadly, the court's decision leaves parties, arbitrators, and district judges uncertain about the extent to which arbitral factfinding will be insulated from judicial second-guessing. The "manifest disregard of the evidence" standard will become an invitation for every losing party in every arbitration to seek judicial review, in the hope that the reviewing court will conduct its own assessment of the relative strengths of each party's factual presentation. So long as the party seeking vacatur can convince that court that it presented "powerful" evidence or made "a very strong showing" (the characterizations used by the Second Circuit here), the finality of the arbitral award will be lost, and with it the purported savings in time and resources that are widely viewed as the advantages of arbitration over litigation. *See Gilmer*, 500 U.S. at 26, 31 (by agreeing to arbitrate, the parties "trade[ ] the procedures *and opportunity for review* of the courtroom for the simplicity, informality, and expedition of arbitration") (emphasis added).

Additionally, the court's decision markedly departs from the well established judicial reluctance to require that arbitrators prepare written decisions. *See, e.g., Willemijn Houdstermaatschappij, BV v. Standard Microsys. Corp.*, 103

F.3d 9, 13 (2d Cir. 1997) (in the absence of a written opinion, "we must confirm the arbitrators' decision 'if a ground for [it] can be inferred from the facts of case,' " *even if* that ground is "based on an error of fact or an error of law") (citation omitted); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972) ("forcing arbitrators to explain their award even when grounds for it can be gleaned from the record will unjustifiably diminish whatever efficiency the process now achieves"). While the Second Circuit in this case did not hold that the lack of a written opinion is a *per se* basis for vacatur, the logic of its decision virtually compels that conclusion. It stated:

> At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.

16a-17a; *see also* 17a ("the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard").

Other than the rare case where the evidence can be realistically interpreted in only one way, an arbitrator's failure to issue a written decision can, on the authority of the Second Circuit's decision, be cited as a factor warranting vacatur, at least where the court is otherwise "inclined" to vacate. Thus, despite its assurances to the contrary, *see* 17a, the court of appeals made clear, in implication if not in words, that arbitrators who decline to issue opinions, especially in closely contested arbitrations, do so at their peril.

In a further weakening of arbitration's structural advantages, the court's decision creates a regime of judicial review for arbitration that is more searching and intrusive than appellate review of factfinding by a jury or trial judge. In the context of jury verdicts, for example, courts must accord great deference to the verdict and resolve all factual inferences in favor of the verdict. *See, e.g., Tennant v. Peoria & Pekin Union Ry. Co.*, 321 U.S. 29, 35 (1944). The same deferential approach is true of appellate court review of a district court's factual findings. *See Anderson*, 470 U.S. at 573. Yet despite the rule that "judicial review of an [arbitration] award is more limited than judicial review of a trial," *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956), the court of appeals's decision harbingers precisely the opposite result. With the license of the "manifest disregard of the evidence" standard, a reviewing court could give arbitral awards virtually no deference at all, choosing instead to vacate for no reason other than that it would have resolved the facts differently.

The decision thus turns on its head the federal policy favoring arbitration, which this Court reaffirmed earlier this Term. *See Wright v. Universal Maritime Service Corp.*, 119 S. Ct. 391, 394-95 (1998). Notwithstanding both the FAA and more recent congressional proclamations of support for and encouragement of arbitration as an alternative to litigation, *see* Civil Rights Act of 1991, Pub. L. No. 102-166, § 118, 105 Stat. 1071 (1991) ("Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including . . . arbitration is encouraged to resolve disputes arising under the Acts or provisions of Federal law amended by this title," including the ADEA), the Second Circuit's decision leads courts in the opposite direction.

These effects will be felt regardless of the context in which the arbitration occurs. While this case involves a plaintiff who

submitted his claim to arbitration in the first instance, nothing in either the language or the reasoning of the Second Circuit's decision limits its newly announced rule to those circumstances.[4] Absent a decision from this Court, the Second Circuit's approach threatens the finality of arbitration awards in all contexts — in employment cases and non-employment cases; in cases raising statutory claims and those raising common law claims; in cases with pre-dispute arbitration agreements or post-dispute agreements; and perhaps even in the context of awards rendered pursuant to collective bargaining agreements.

Such a transformation of settled law, if it is to occur at all, should be announced by Congress or this Court. This case accordingly warrants issuance of a writ of *certiorari*.

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4. The Second Circuit spent a great deal of its opinion addressing issues pertaining to mandatory pre-dispute arbitration agreements, such as the form U-4 Mr. Halligan executed in this case. *See* 9a-14a. It ultimately concluded, however, that Mr. Halligan's claim would have been subject to a valid motion to compel arbitration had he attempted to litigate it. *See* 9a, n.2. Because Mr. Halligan did not in fact seek to litigate his claim, but rather proceeded directly to arbitration, the court's lengthy discussion of this issue is *dicta*, and there is nothing in the opinion to suggest that its holding as to the applicable standard of review is limited to the context of mandatory pre-dispute agreements.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND DECIDED JULY 9, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1997

Argued: January 9, 1998 Decided: July 9, 1998

Docket Nos. 97-7801, -7839

IRENE HALLIGAN, as Executrix
of the Estate of Theodore H. Halligan,

Petitioner-Appellant,

—against—

PIPER JAFFRAY, INC., and MARVIN GEISNESS,

Respondents-Appellees.

Before:

FEINBERG and KEARSE, *Circuit Judges*,
and PARKER*, *District Judge*.

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* Hon. Barrington D. Parker, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Appendix A

Appeal from orders of the United States District Court for the Southern District of New York, Kimba M. Wood, J., confirming an arbitration award in favor of respondents on petitioner's claim under the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and other claims, which were submitted to arbitration pursuant to a pre-dispute agreement to arbitrate imposed as a condition of employment, and dismissing as barred by res judicata a federal complaint based on the same underlying facts. Held, panel concludes that because arbitrators' award was in "manifest disregard" of the law or the evidence or both, it is vacated.

Reversed and remanded.

KATHLEEN O'CONNELL, New York, NY (Murphy & O'Connell, of Counsel), *for Petitioner-Appellant.*

JILL L. ROSENBERG, New York, NY (Orrick, Herrington & Sutcliffe LLP, Robert C. Whitman, of Counsel), *for Respondents-Appellees.*

Fredda L. Plesser, Vice President & Associate General Counsel, Securities Industry Association, New York, NY, *for Respondents-Appellees as Amicus Curiae.*

C. Gregory Stewart, General Counsel, J. Ray Terry, Jr. Deputy General Counsel, Gwendolyn Young Reams, Associate General Counsel, Lorraine C. Davis, Assistant General Counsel, Robert J. Gregory, Attorney,

Appendix A

Equal Employment Opportunity Commission, Washington, DC, *as Amicus Curiae.*

FEINBERG, Circuit Judge:

Irene Halligan (Mrs. Halligan), as executrix for the Estate of Theodore Halligan (Halligan), appeals from orders dated April 14, June 10 and June 16, 1997 of the United States District Court for the Southern District of New York, Kimba M. Wood, J. The orders of April 14 and June 10 respectively refused to vacate and then confirmed an arbitration award in favor of defendants Piper Jaffray, Inc. (Piper) and Marvin Geisness, Halligan's sales partner, on Halligan's claim, among others, that defendants had terminated his employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. The order of June 16, 1997, dismissed as barred by res judicata Mrs. Halligan's federal complaint based on the same underlying facts as the ADEA claim in arbitration.

Mrs. Halligan argues, among other things, that the award reflected "manifest disregard" of the law. We agree, and accordingly reverse the orders of the district court.

I. Background

Halligan was hired by Piper in 1973 as a salesman of equity investments to financial institutions. As a condition of employment, Halligan was required by the industry self-regulatory organization, the National Association of Securities Dealers (NASD), to sign a standard form (U-4) containing an agreement to arbitrate any future disputes.[1] In 1988, Tad

[1] Halligan was required to agree "to arbitrate any dispute . . . that may arise between me and my firm . . . required to be arbitrated under the rules, con-

Piper succeeded his father as CEO of Piper. Mrs. Halligan contends that thereafter Halligan was forced from his job in December 1992 by Tad Piper and Halligan's supervisor, Bruce Huber, because of his age and despite his continuing high performance.

In October 1993, Halligan submitted his ADEA claim, along with other claims, to arbitration before a panel of NASD arbitrators. Before he could complete his own redirect testimony, however, his health deteriorated and in early 1995 the arbitrators were advised that Halligan was unable to testify further. By stipulation, the arbitrators struck his redirect testimony from the record and continued the proceeding. Halligan's direct testimony had been subject to cross-examination and was not stricken. After his death, Mrs. Halligan continued the arbitration.

During the arbitration hearings, Halligan presented the arbitrators with very strong evidence of age-based discrimination. Piper for its part has conceded throughout that Halligan was "basically qualified." Piper principally contended that Halligan had chosen to retire; it also argued that performance and health issues justified its conduct.

Before leaving Piper in December 1992, Halligan was making nearly $500,000 per year. He ranked fifth out of 25 institutional salesmen. He was ranked first from 1987 through 1991, and had consistently been among Piper's top salesmen. He testified as to repeated discriminatory statements by Tad Piper, Huber, and Halligan's younger partner Geisness. For example, Halligan testified that at a meeting on

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stitutions, or by-laws of [the NASD.]" When Halligan signed his U-4, section 1 of the NASD's Code of Arbitration Procedure allowed for the submission of "any dispute . . . arising out of or in connection with the business of any member . . . between or among members and public customers, or others . . . ." Section 8 required submission of "[a]ny dispute . . . eligible for submission . . . between . . . members and/or associated persons . . . arising in connection with the business of such member(s) . . . ."

August 27, 1992, Tad Piper told him "you're too old. Our clients are young and they want young salesmen," and Huber told him "we want you out of here quickly." Tad Piper and Huber denied making such remarks. Halligan also testified that during a telephone conversation on September 10, 1992, Huber told him that "we want you out of Piper Jaffray by the end of the year," and that "if you don't leave, we will fire you." Halligan testified that he then asked if he could stay for the remainder of the year, and that Huber agreed. Huber testified that during the conversation, Halligan asked him what he should do. He testified that he advised Halligan to resign, and that Halligan agreed "then that's what it will be." Huber admitted that Halligan had never requested his advice before. There were no witnesses to this conversation.

Halligan's evidence also included his notes of this and other conversations, a witness who testified that he had seen Halligan recording notes, and several witnesses who heard Halligan say he was being "fired." In addition, Halligan called many witnesses who testified that Piper personnel had expressed their intention to oust Halligan on account of his age. John Dockendorff, a former client and later competitor, testified that in 1989 (the year after Tad Piper became CEO) Huber attempted to recruit him (in Dockendorff's words) to "learn as much as I could about [Halligan's] accounts," because Halligan "would get put out to pasture because he was getting old." All Piper personnel denied having made such statements, although their testimony was occasionally inconsistent or ambiguous. Halligan presented testimonials from current and former clients and colleagues who testified that Halligan was among the best in his field. Halligan refused to provide Piper with a letter of resignation. He also refused an offer of a retirement party and refused to write a letter to his clients saying he was retiring. On November 23, 1992, Halligan's lawyer sent a letter threatening suit if Hal-

ligan was terminated. In addition, Halligan testified that he approached Huber in November and asked him if he could keep his job. Huber replied that plans had already been made to close the New York office. Apparently, those plans consisted simply of termination notices to two support staff. Halligan's accounts were thereafter assigned to two younger men. Halligan testified that he unsuccessfully looked for a new job after leaving Piper.

Piper principally argued that it gave Halligan the options of retiring, agreeing to a new percentage split with Geisness or being assigned a new group of accounts, and that Halligan agreed to retire in the phone conversation on September 10, 1992. Piper also contended its conduct was justified by concerns over Halligan's performance and health. Halligan had surgery for oral cancer twice (in 1990 and 1991), but returned to work each time after approximately two weeks. Halligan conceded that the surgeries had caused slight speech impairment, but offered various witnesses who testified that Halligan was always able to perform his job. Piper discounted Halligan's objective evidence of performance, arguing that Halligan's accounts had more inherent potential and that the rankings failed to reflect the contributions that other employees had made to Halligan's success. In addition, Huber testified that he thought Halligan needed to develop accounts more effectively (although Huber was unable to identify specific accounts) and use the firm's research and other resources more efficiently. Piper submitted various memoranda related to these concerns, and offered testimony by various witnesses who, with the exception of one employee who had recently retired, were all Piper officers or major shareholders. Piper discounted the testimonials in favor of Halligan, arguing that it was not his clients and former colleagues whose expectations Halligan had to satisfy.

Huber was the only witness testifying that in the September 10th telephone conversation Halligan accepted the "option" of retirement, and Huber was contradicted as to key elements of his testimony by other Piper witnesses. For example, Huber testified that Geisness was not informed of the August 27 meeting before it took place, but both Tad Piper and Geisness testified to the contrary. Geisness testified that when he discussed this meeting with Huber, he asked Huber to keep the New York office open.

In March 1996, after extensive hearings, the arbitrators rendered a written award setting forth the claims and defenses of each party, and denying any relief to the Halligans. The award did not contain any explanation or rationale for the result.

In June 1996, Mrs. Halligan petitioned the district court to vacate the award under § 10(a) of the Federal Arbitration Act (FAA), 9 U.S.C. § 10(a). She argued, among other things, that given the very strong evidence of discrimination and the clear description of the applicable law presented to the arbitrators, the award reflected manifest disregard of the law.

Piper agreed that the law governing the claim was generally not disputed by the parties, but argued in response that it was not the function of the court to review the merits of the decision and that the arbitrators' award was supported by the evidence Piper presented. Piper cross-petitioned the district court to confirm the award.

The district judge refused to vacate the award. She stated in the order of April 14, 1997 that

> [h]ere, the determination of what constitutes `direct evidence' [of discrimination] . . . is a difficult one to make. In addition, the record . . . does not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof. . . . [T]he Panel was

> faced with the task of evaluating conflicting witness testimony, and where it did not issue a written opinion, I cannot conclude that the panel did in fact disregard the parties' burdens of proof. . . . [C]rediting one witness over another does not constitute manifest disregard of the law [and] this Court's role is not to second-guess the fact-finding done by the Panel. Because there is factual as well as legal support for the Panel's ultimate conclusion, I determine that the Panel did not manifestly disregard the law . . . . (internal citations and footnote omitted).

The judge granted Piper's cross-petition to confirm the award in her order of June 10, 1997.

In addition to petitioning to vacate the arbitration award, in October 1996 Mrs. Halligan had filed a complaint in the district court based upon the same underlying facts and raising the ADEA claim. Piper moved to dismiss this complaint on grounds of res judicata, and the district court granted the motion in its order dated June 16, 1997.

II. Analysis

Mrs. Halligan argues in this court, among other things, that the arbitrators' award reflected manifest disregard of the law. Piper argues in response, among other things, that it is not the function of this court to reassess the evidence or make judgments about witness credibility and that the district court was able to adequately review the award—even in the absence of a written explanation—by inferring from the record grounds that support the arbitrators' award. We have also received amicus briefs from the Equal Employment Opportunity Commission (EEOC) and the Securities Industry Association (SIA).

Appendix A

A. Arbitrability of ADEA Claims

This appeal arises in a context that has become increasingly important in the federal courts. The use of arbitration as a device to resolve disputes has received strong judicial support in the last few decades, both in labor management disputes and also in disputes involving ordinary commercial contracts. See e.g., AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986) (labor dispute); Moses H. Cone Memorial Hosp. v. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983) (commercial dispute). It has been made clear by the Supreme Court, this court and other courts that the ancient judicial hostility to arbitration is a thing of the past. See e.g., Moses H. Cone Memorial Hosp., 460 U.S. at 24; Leadertex v. Morganton Dyeing & Finishing Corp., 67 F.3d 20, 24-25 (2d Cir. 1995); Finegold, Alexander + Assocs., Inc. v. Setty & Assocs., Ltd., 81 F.3d 206, 207-08 (D.C. Cir. 1996); José A. Cabranes, Arbitration and U.S. Courts—Balancing Their Strengths, A.D.R. Currents, Fall 1997, at 1. However, one aspect of the increased use of arbitration has recently engendered greater scrutiny and controversy—the use of mandatory pre-dispute arbitration agreements to resolve statutory claims of employment discrimination. Such agreements require an individual, as a condition of employment, to agree in advance to arbitration of future claims alleging violation of a statute prohibiting discrimination in employment. The arbitration award here arose out of such an agreement.[2]

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[2] Piper contends that Halligan *voluntarily* submitted his claim to arbitration. Halligan had, however, been required to agree to an extremely broad arbitration clause, see footnote 1, which established a presumption of arbitrability that could only be overcome if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Associated Brick Mason Contractors of Greater New York, Inc. v. Harrington, 820 F.2d 31, 35 (2d Cir. 1987) (quoting AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 650 (1986)). In light of our current caselaw, Halligan was correct in considering himself bound to arbitrate.

Appendix A

In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court found for the first time that an employee could be held to his pre-dispute agreement to arbitrate his claim under the ADEA, the same statute upon which the Halligans rely. The Court relied on a line of cases, commencing with Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), that held enforceable pre-dispute arbitration agreements as applied to claims under various federal statutes, including the securities acts and RICO. In *Mitsubishi*, the Court had enforced an agreement between two corporations to arbitrate claims under the federal antitrust laws, on the premise that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." Id., 473 U.S. at 628. In *Gilmer*, which quoted this language, the Court held that an employee, who had been required to sign a form containing an agreement to arbitrate as a condition of employment, had not shown that Congress intended to preclude the waiver of a judicial forum for ADEA claims. 500 U.S. at 26. Again quoting from *Mitsubishi*, the Court stated that "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." Id. at 28.

The Court also noted in *Gilmer* the contention "that judicial review of arbitration decisions is too limited" to adequately protect statutory rights. Id. at 32 n.4. Quoting from Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987), the Court rejected that argument, stating that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Gilmer*, 500 U.S. at 32 n.4. The employee in *Gilmer* also generally chal-

lenged the procedures usually employed in arbitration. The Court stated that these "claimed procedural inadequacies" are "best left for resolution in specific cases." Id. at 33.

B. Standard of Review of Award

The parties agree that review of arbitration awards is generally governed by the FAA. The relevant statutory language is reproduced in the margin.[3] In addition, relying on an observation by the Supreme Court in Wilko v. Swan, 346 U.S. 427, 436-37 (1953), overruled on other grounds in Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989), this court has also recognized that an arbitration award may be vacated if it is in "manifest disregard of the law." See e.g., Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd., 888 F.2d 260, 265 (2d Cir. 1989); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986). We have also pointed out, however, that the reach of the doctrine is "severely limited." Government of India v. Cargill, Inc., 867 F.2d 130, 133 (2d Cir. 1989). Indeed, we have cautioned that manifest disregard "clearly means more than error or misunderstanding with respect to the law." Bobker, 808 F.2d at 933. We have further noted that to modify or vacate an award on this ground, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and

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[3] The FAA provides that an award may be vacated where

(1) . . . the award was procured by corruption, fraud or undue means[.]

(2) . . . there was evident partiality or corruption in the arbitrators . . . [.]

(3) . . . the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced [; or]

(4) . . . the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the . . . matter submitted was not made.

9 U.S.C. § 10(a).

(2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case. DiRussa v. Dean Witter Reynolds Inc., 121 F.3d 818, 821 (2d Cir. 1997), cert. denied, 118 S.Ct. 1695 (1998).[4]

This case also arises in the context of other developments. In the aftermath of *Gilmer*, as we have already noted, mandatory binding arbitration of employment discrimination disputes as a condition of employment has caused increased controversy. Attention has focused on, among other things, whether additional procedural requirements are necessary to ensure that employees will be able, in the words of *Gilmer*, to "effectively . . . vindicate" their statutory rights in arbitration. 500 U.S. at 28. See e.g., Commission on the Future of Worker-Management Relations, Report and Recommendations (1994) (Dunlop Report); EEOC Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment, No. 915.002 (July 10, 1997); Samuel Estreicher, Predispute Agreements to Arbitrate Statutory Employment Claims, 72 N.Y.U. L. Rev. 1344, 1352-59 (1997). The major independent arbitration agencies have formulated due process standards for the adjudication of these disputes. See e.g., National Academy of Arbitrators, Guidelines on Arbitration of Statutory Claims Under Employer-Promulgated Systems (Statement adopted May 21, 1997); American Arbitration Association, National Rules for the Resolution of Employment Disputes (1996, as amended 1997); JAMS/ENDISPUTE, Six Principles of Neutrality and Fairness for Employment Dispute Resolution Practice (1995).

Industry self-regulatory organizations (SRO's) like the NASD have been singled out for criticism because, among

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[4] See generally, Michael P. O'Mullan, Note, Seeking Consistency in Judicial Review of Securities Arbitration: An Analysis of the Manifest Disregard of the Law Standard, 64 Fordham L. Rev. 1121 (1995).

other reasons, the role they play in determining the pool of available arbitrators and selecting the arbitrators who will hear a particular discrimination claim against a member firm of the SRO calls into question the impartiality of the arbitrators selected. See e.g., Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., Civ. No. 96-12267, 1998 WL 81907, at *16-*21 (D. Mass. Jan. 26, 1998) (appeal pending) (discussing possibility of institutional bias due to industry influence over arbitration before SRO's and, in particular, under the rules of the New York Stock Exchange); George Nicolau, Gilmer v. Interstate/Johnson Lane Corp.: Its Ramifications and Implications for Employees, Employers and Practitioners, 1 U. Pa. J. Lab. & Emp. L. 175, 183 (forthcoming 1998).

Mrs. Halligan argues that the NASD has undue influence here. Under the NASD's Code of Arbitration Procedure, a pool of arbitrators "from within and without the securities industry" is selected by a National Arbitration Committee, a body appointed annually by the Board of Governors "of such size and composition, including representation from the public at large, as [the Board] shall deem appropriate and in the public interest." NASD Code of Arbitration Procedure § 2. The composition of particular panels is then determined by a Director of Arbitration who is also appointed by the Board of Governors, and the Director has discretion to allow the Executive Committee of the National Arbitration Committee to appoint the panel for a case directly. Id. at §§ 3-4. Each party is allowed a single peremptory challenge as of right. Id. at § 22.

In response to criticism, the NASD has recently filed a proposed rule change with the Securities and Exchange Commission under which its member organizations would not be required to condition employment on an employee's agreement to arbitrate these disputes. Notice of Filing of Proposed Change by the NASD Relating to the Arbitration of Employ-

ment Discrimination Claims, 62 F.R. 66164 (December 17, 1997). The filing promises further unspecified rule changes to enhance the fairness of the procedures applied by the NASD in this context. There have also been bills introduced in Congress that would prevent pre-dispute waiver of a judicial forum. See the Civil Rights Procedures Protection Act of 1997, S. 63, H.R. 983, 105th Cong. (1997).

In addition, the federal courts have shown growing concern over the problem. For example, the D.C. Circuit has recently emphasized the necessity of adequate review in enforcing a mandatory, pre-dispute agreement to arbitrate Title VII discrimination claims. Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465 (D.C. Cir. 1997). Similarly, in Prudential Ins. Co. of Am. v. Lai, 42 F.3d 1299 (9th Cir. 1994), the Ninth Circuit held that waivers of a judicial forum for statutory employment discrimination claims must be "knowing and voluntary" and refused to enforce an agreement to arbitrate that did not meet that standard. See also Chisolm v. Kidder, Peabody Asset Management, 966 F. Supp. 218, 225-26 (S.D.N.Y. 1997) (appeal pending) (thorough review of relevant authorities); Rosenberg, 1998 WL 81907 (holding employee could not be compelled to arbitrate her claim given questions as to the voluntary nature of her agreement to arbitrate and procedural deficiencies in the proposed arbitral forum). Given our disposition of this appeal on the merits of the award issued in this case, with one exception discussed below we do not address Mrs. Halligan's generalized challenge to arbitrations conducted under the aegis of the NASD.

C. Application of Standard of Review

We turn now to review of the district court's decision in this case. Mrs. Halligan argued in the district court and repeats to us that the arbitration award reflected manifest disregard of the law. Mrs. Halligan makes a strong case for that

proposition. Quite simply, Halligan presented overwhelming evidence that Piper's conduct after Tad Piper became CEO was motivated by age discrimination. Halligan testified to repeated discriminatory statements, and offered contemporaneous notes supporting his version of events, which were in turn backed by the testimony of a witness who saw him making notes. Halligan also presented the testimony of numerous other witnesses who testified that Piper personnel admitted that the company wanted Halligan out. Halligan presented powerful evidence of his performance, in the form of quantitative sales rankings and relevant witness testimony. Notwithstanding Piper's testimony as to Halligan's performance and health, Piper conceded before the arbitrators—and continues to do so—that Halligan's continuing performance was not so unsatisfactory as to justify discharge. Indeed, its principal argument has been that Halligan retired voluntarily. Halligan also made a very strong showing that he did not choose the "option" of quitting but was fired. The strength of Halligan's showing of discriminatory motive is most probative of whether Piper took discriminatory action, i.e., fired him. In addition, the circumstantial evidence surrounding his departure, e.g., his statements to various witnesses about his being "fired," his refusal to write to his clients announcing his "resignation," his retention of counsel, is consistent only with a finding that Halligan was pushed out of his job.

Moreover, this is not a case like *DiRussa* where we refused to find "manifest disregard" because DiRussa had not sufficiently brought the governing law to the attention of the arbitrators. There is no such problem here. The record indicates that counsel for both parties generally agreed on the applicable law (and still do on appeal), and explained it to the arbitrators. It is true that the district court stated that the record "does not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof." If this

observation meant that counsel did not explain the law sufficiently to the arbitrators, it is not correct. Perhaps the district court meant that the arbitrators did not state that they were ignoring the relevant standards for burdens of proof. That is true, but we doubt whether even under a strict construction of the meaning of manifest disregard, it is necessary for arbitrators to state that they are deliberately ignoring the law. See DeGaetano v. Smith Barney, Inc., 983 F.Supp. 459, 463 (S.D.N.Y. 1997).

In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both. Moreover, the arbitrators did not explain their award.[5] It is true that we have stated repeatedly that arbitrators have no obligation to do so. E.g., Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir. 1972); Koch Oil, S.A. v. Transocean Gulf Oil Corp., 751 F.2d 551, 554 (2d Cir. 1985); Andros Compania Maritima, S.A. v. Marc Rich & Co., A.G., 579 F.2d 691, 704 (2d Cir. 1978). But in *Gilmer*, when the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, the Court did so on the assumptions that the claimant would not forgo the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in the arbitration. 500 U.S. at 26, 28. This case puts those assumptions to the test. The Court also stated in *Gilmer* that "claimed procedural inadequacies" in arbitration "are best left for resolution in specific cases," 500 U.S. at 33. At least in the circumstances here, we believe that when a reviewing court is inclined to

[5] A leading expert in the field has asserted that NASD arbitrators are expressly advised that they are not required to follow the law and need not give reasons for their determination. Nicolau, supra, p. 17, at 183.

hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so, we are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both.

Piper argues that the arbitration panel resolved the case in accordance with substantive ADEA law; for example, it credited Piper's witnesses rather than Halligan's. Had the arbitrators offered that explanation of the award, on this record it would have been extremely hard to accept—but they did not do even that. There is some authority permitting discretionary remand of a case to the arbitrators for a written explanation of their award. Siegel v. Titan Indus. Corp., 779 F.2d 891, 894 (2d Cir. 1985) (per curiam). But in view of the entire record here, we see no persuasive reason for doing so.

We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard.

For the reasons stated above, we reverse the district court's orders of April 14, 1997 and June 10, 1997 respectively refusing to vacate and then confirming the award. We also reverse the order of June 16, 1997 dismissing the complaint filed in the district court by Mrs. Halligan because there is no enforceable award to bar the suit on res judicata principles. We remand to the district court for further proceedings consistent with this opinion.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 16, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 7468 (KMW)

IRENE HALLIGAN as Executrix of the Estate of THEODORE H. HALLIGAN,

Plaintiff,

-against-

PIPER JAFFRAY, INC. & MARVIN GEISNESS,

Defendants.

OPINION & ORDER

WOOD, U.S.D.J.

Plaintiff Irene Halligan ("Plaintiff") initiated this action under the Age Discrimination in Employment Act (the "ADEA"), alleging that defendants Piper Jaffray, Inc. ("Piper Jaffray") and Marvin Geisness (collectively, "Defendants") discriminated against her late husband, Theodore Halligan ("Mr. Halligan"), a former employee of Piper Jaffray. Defendants have moved to dismiss the complaint in this action, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). This Court has already entered judgment confirming an award in arbitration based upon the same claim that is the subject of the instant lawsuit;

accordingly, under the doctrine of res judicata, I now dismiss this complaint, pursuant to Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief can be granted.

The shared factual background of this action and the related action before this Court, *Halligan v. Piper Jaffray, Inc. and Marvin Geisness*, No. 96 Civ. 4472, is set out more fully in the Court's Opinion and Order in the latter case dated April 14, 1997, with which I assume familiarity. In brief, Mr. Halligan alleged that his former employer, Piper Jaffray, terminated him in violation of the ADEA and other common law rights. In October of 1993, Mr. Halligan initiated an arbitration proceeding on those claims against Defendants. Mr. Halligan died in October of 1995, before the arbitration had been completed. Plaintiff authorized Mr. Halligan's counsel, now Plaintiff's counsel, to continue with the arbitration. In March of 1995, the arbitration panel issued an award that denied all of Mr. Halligan's claims. Subsequently, in the action to which this case is related, No. 96 Civ. 4472, Plaintiff here (Petitioner in that action) petitioned to vacate the arbitration award; Defendants (Respondents in the related action) cross-petitioned to confirm the award. In an Opinion and Order dated June 10, 1997, this Court confirmed that award, entered judgment for Defendants, and closed the related case.

It is settled in this circuit that the findings of arbitration boards may serve as the basis for res judicata in an action in federal court. *See Khandar v. Elfenbein*, 943 F.2d 244, 244 (2d Cir. 1991) Res judicata bars the re-litigation of the same issues between the same parties after those issues have been resolved by a court of competent jurisdiction. *Stone v. Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992). Where, as here, an arbitration award has been confirmed by a court of competent jurisdiction,

the final entry of judgment by that court gives the award res judicata effect. Plaintiff had a fair opportunity to argue fully Mr. Halligan's ADEA and other claims before the arbitration panel, and res judicata now precludes Plaintiff from bringing the same claim, or any other claim that could have been decided by the arbitration panel, before this Court.

Because Plaintiff's claims are barred by res judicata, I grant defendants' motion to dismiss the complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). I therefore order the Clerk of Court to close this case. Any pending motions are hereby deemed moot.

SO ORDERED:

New York, New York
June 16, 1997

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the respective parties.

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED JUNE 10, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 4472 (KMW)

IRENE HALLIGAN as Executrix of the Estate of THEODORE H. HALLIGAN,

Petitioners,

-against-

PIPER JAFFRAY, INC. & MARVIN GEISNESS,

Respondents.

OPINION & ORDER

WOOD, U.S.D.J.

Petitioner Irene Halligan ("Petitioner") filed a petition to vacate an arbitration award (the "Award") made after an arbitration proceeding brought by her husband, Theodore Halligan ("Mr. Halligan"), against Piper Jaffray, Inc. and Marvin Geisness ("Respondents"), alleging violation of the Age Discrimination in Employment Act and other common law rights. The Award rendered on March 19, 1995, denied all of Mr. Halligan's claims. In an opinion and order dated April 14, 1997, I denied the petition to vacate. Respondents have cross-petitioned to confirm the Award. For the following reasons, I grant Respondents' cross-petition.

Appendix C

I. Analysis

The factual background of this action is fully set forth in my opinion and order of April 14, 1996, with which I assume familiarity. Respondents argue that because no grounds exist to vacate the award, the Court must confirm the Award pursuant to 9 U.S.C. § 9. Petitioner argues that the Court may not confirm the Award for two reasons. First, Petitioner argues that the Court lacks subject matter jurisdiction over Respondents' cross-petition; second, Petitioner argues that Respondents' cross-petition was improperly filed. Because both of those arguments are without merit, as discussed below, I confirm the Award in accordance with 9 U.S.C. § 9.

1. Whether the Court Has Subject Matter Jurisdiction

Petitioner contends that the Court lacks subject matter jurisdiction because (1) there was no agreement between the parties regarding the entry of judgment after an award in arbitration, (2) there was no agreement between the parties to arbitrate disputes, (3) there was no agreement between the parties to arbitrate *employment* disputes, and (4) Petitioner lacked the authority, under New York law, to continue in the arbitration after Mr. Halligan's death. Because I have already determined that the last of these contentions is without merit, *see* April 14, 1997 Opinion and Order at 10-13, I address the remainder of Petitioner's contentions below.

First, Petitioner argues that this Court has no jurisdiction because Mr. Halligan and Respondents did not enter into an agreement providing for entry of judgment after an award in arbitration. Petitioner admits that Mr. Halligan signed a Uniform Submission Agreement with the National Association of

Securities Dealers (the "NASD"), which submitted the dispute between Mr. Halligan and Respondents to arbitration and specifically provided that "a judgment and any interest due thereon may be entered upon [an award] and, for these purposes, the undersigned parties hereby voluntarily consent to submit to the jurisdiction of any court of competent jurisdiction which may properly enter such judgment."[1] Petitioner's argument that the Uniform Submission Agreement does not provide for entry of judgment in this case because it was not an agreement between Respondents and Petitioner, but rather, an agreement between the NASD and Petitioner, is without merit. All parties to the arbitration at issue here signed the Uniform Submission Agreement, and all understood that the terms of that Agreement would govern the arbitration.

Second, Petitioner argues that this Court is without jurisdiction because the only agreement to arbitrate that was signed by Mr. Halligan was contained in his 1985 Form U-4, an application for registration as a securities dealer, rather than in a contract between Mr. Halligan and Respondents. However, as Respondents note, the Uniform Submission Agreement

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1. I note that neither party presented the Court with a copy of the Uniform Submission Agreement signed by Mr. Halligan. Respondents attached one copy of that Agreement signed by Marvin Geisness, and one copy of that Agreement signed by a representative of Piper Jaffray, as Exhibit 2 to Jill L. Rosenberg's Affirmation in Opposition to the Petition to Vacate the Award in Arbitration. However, because Petitioner does not dispute that Mr. Halligan signed the Uniform Submission Agreement, *see* Pet. Mem. in Opp. at 3-4, the Court considers the terms of the Uniform Submission Agreement as binding on Mr. Halligan. Petitioner's argument that the Uniform Submission Agreement is not binding on her because the Agreement contains no provision that it is binding upon Mr. Halligan's successors or executors is without merit for the reasons stated in this Court's April 14, 1997 Opinion and Order.

signed by Mr. Halligan and Respondents may serve as the parties' contract to arbitrate. *See, e.g., Mihalakis v. Pacific Brokerage Services, Inc.*, 1991 WL 280236, * 3 (S.D.N.Y. December 23, 1991) (Haight, J.); *Shearson Lehman Brothers, Inc. v. Neurosurgical Associates of Indiana*, 896 F. Supp. 844, 846 n. 2 (S.D. Ind. 1995). Whether or not the parties have an independent agreement to arbitrate disputes, the decision by Mr. Halligan and Respondents each to sign the Uniform Submission Agreement constitutes an independent agreement to arbitrate their dispute.

Finally, Petitioner's argues that because the Uniform Submission Agreement does not provide that the parties arbitrate employment disputes, it cannot constitute the parties' contract to arbitrate. That argument is meritless; again, Petitioner has failed to understand the nature of the Uniform Submission Agreement. The Uniform Submission Agreement, bearing the caption "In the Matter of the Arbitration Between [claimant] Theodore Halligan [and] [respondents] Piper Jaffray Inc. [and] Marvin Geisness," states that the parties "hereby submit the present matter in controversy, as set forth in the attached statement of claim, answers, cross claims and all related counterclaims and/or third party claims which may be asserted, to arbitration." Although neither party has submitted the attached statement of claim or other attached documents, Petitioner does not allege that there is any dispute between Mr. Halligan and Respondents other than Mr. Halligan's age discrimination in employment claim that was, in fact, the subject of the arbitration. The plain language of the Uniform Submission Agreement indicates that the employment dispute between Mr. Halligan and Respondents — the *only* dispute between those parties — was the subject of the arbitration, and that both Mr. Halligan and Respondents, through the signing

of the Uniform Submission Agreement, agreed to submit that dispute to arbitration. For all of the reasons stated above, Petitioner's argument that the Court does not have subject matter jurisdiction over this action is without merit.

2. Whether the Cross-Petition Was Improperly Filed

Petitioner offers no legal authority to support the proposition that the petition to vacate the Award and the petition to confirm the Award may not be heard in one action. Indeed, Respondents' decision to file its petition to confirm the Award as a cross-petition within the action brought by Petitioner to vacate the Award comports with the principles of judicial economy and efficiency. Courts routinely consider such petitions together. *See, e.g., First Interregional Equity Corp. v. Haughton*, 842 F. Supp. 105 (S.D.N.Y. 1994). For that reason, I deny Petitioner's request to strike Respondents' cross-petition, and I find that the manner in which the petition to confirm the Award was presented is no impediment to ruling on the petition's merits.

II. Conclusion

Because no grounds exist upon which to vacate, modify, or correct the Award, I hereby grant the cross-petition to confirm the arbitration award, pursuant to 9 U.S.C. § 9, and I enter judgment for Respondents. I order the Clerk of Court to close this case.[2]

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2. I note that Petitioner in this action has filed a related action in this Court, and that a motion to dismiss is currently pending in that action. The Court will decide that motion in a subsequent opinion and order.

Appendix C

SO ORDERED:

New York, New York
June 10, 1997

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the respective parties.

APPENDIX D — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 14, 1997

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

96 Civ. 4472 (KMW)

IRENE HALLIGAN as Executrix of the Estate of THEODORE H. HALLIGAN,

Petitioners,

-against-

PIPER JAFFRAY, INC. & MARVIN GEISNESS,

Respondents.

OPINION & ORDER

WOOD, U.S.D.J.

Petitioner Irene Halligan ("Petitioner") has filed a petition to vacate an arbitration award made after an arbitration proceeding brought by her husband, Theodore Halligan ("Mr. Halligan"), against Piper Jaffray, Inc. and Marvin Geisness ("Respondents"). For the following reasons, I deny the petition to vacate.

I. Background

Mr. Halligan was employed by Piper Jaffray, Inc. ("Piper") from 1973 to 1992 as an institutional equity salesperson.

O'Connell Aff. at ¶ 7. In January of 1993, Mr. Halligan filed a claim against Piper with the Equal Employment Opportunity Commission. *Id.* at ¶ 9. In October of 1993, Mr. Halligan instituted an arbitration proceeding against Piper and one of its employees, Marvin Geisness ("Geisness"), before the National Association of Securities Dealers (the "NASD"), alleging that he was discharged by Piper due to his age, in violation of both the Age Discrimination in Employment Act (the "ADEA") and certain rights at common law. The extensive hearings on Mr. Halligan's claims began in September of 1994. Mr. Halligan completed his own direct testimony, was cross-examined by Respondents, and began his own re-direct testimony before the hearing was postponed to allow other witnesses to testify.

In December of 1994, Mr. Halligan was diagnosed with a recurrence of oral cancer.[1] He thus did not appear at the final sessions of his own case, nor did he appear at the sessions of Respondents' case. In April of 1995, the parties stipulated, in light of Mr. Halligan's increasingly serious medical condition, that the brief re-direct testimony he had offered would be stricken from the record. Mr. Halligan died on October 9, 1995. He had designated his wife, Petitioner, as his sole Executrix.

Petitioner informed Mr. Halligan's counsel that she wished to continue with the arbitration proceeding on behalf of Mr. Halligan's estate. On October 16, 1995, Mr. Halligan's counsel notified the Panel that Petitioner had authorized counsel to

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1. Petitioner, by her attorney, states that this occurred in December 1995, O'Connell Aff. at ¶ 13, and that Mr. Halligan died in October 1996, O'Connell Aff. at ¶ 14. Given the undisputed fact that the arbitration concluded in October 1995, I note that counsel appears to mean, respectively, that Mr. Halligan was diagnosed with the recurrence of oral cancer in December 1994, and died in October 1995.

proceed with the arbitration. The arbitration continued. On March 19, 1995, the Panel made a final decision in the case, denying all of Mr. Halligan's claims. All told, the arbitration proceeding was extensive, comprised of twenty-six days of testimony and argument spanning a one year period. Evidence included more than 240 exhibits and the testimony of at least twenty-three witnesses. O'Connell Aff. at ¶ 12.

Petitioner now moves to vacate the Award because (1) the Panel acted in manifest disregard of the law; (2) the Panel was guilty of misconduct in refusing to hear evidence relevant to the controversy and through other misbehavior that prejudiced Mr. Halligan; (3) the Panel was partial; (4) the Award violated public policy; and (5) the arbitrators exceeded their authority. I address each argument in turn below.

II. Analysis

A. Standard of Review

A district court's authority to vacate an arbitration award is limited by the Federal Arbitration Act (the "FAA"), 9 U.S.C. § 10. Under the FAA, the court may vacate an arbitration award for the following reasons:

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
>
> (3) Where the arbitrators are guilty of misconduct . . . in refusing to hear evidence pertinent and

> material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). In addition, a district court may vacate an arbitration award on the basis of an arbitration panel's manifest disregard of the law. *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche Int'l, Ltd.*, 888 F.2d 260 (2d Cir. 1989), *quoting Merrill Lynch Pierce, Fenner, & Smith, Inc. v. Bobker*, 808 F.2d 930 (2d Cir. 1986). In order to maintain its well-established deference to arbitration as a favored method of dispute resolution between agreeing parties, the Second Circuit has narrowly interpreted the factors set out in § 10(a), as well as the manifest disregard of the law standard. *See Fahnestock & Co. v. Waltman*, 935 F.2d 512, 516 (2d Cir.), *cert. denied*, 112 S.Ct. 380, 116 L.Ed.2d 331 (1991); *Carte Blanche*, 888 F.2d at 265. Furthermore, the party moving to vacate an arbitration award bears the burden of proof. *See Roche v. Local 32-B2J Serv. Employees Int'l Union*, 755 F. Supp. 622, 624 (S.D.N.Y. 1991), *citing Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 700 (2d Cir. 1978).

B. Whether the Panel Demonstrated Manifest Disregard of the Law

This Court may vacate an arbitration award that was made with manifest disregard of the law. However, judicial inquiry under the manifest disregard standard is extremely limited.

Fahnestock, 935 F.2d at 516. In fact, in order for an error to constitute manifest disregard of the law, it must be "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Id.* (citations omitted). An error "must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator" to constitute manifest disregard of the law. *Merrill Lynch*, 808 F.2d at 933-34. The law that a petitioner alleges to have been disregarded "must be well-defined, explicit, and clearly applicable." *Id.* In addition, the term "manifest disregard" implies that the arbitration panel "appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." Petitioner argues that the Panel manifestly disregarded the ADEA, under which Mr. Halligan brought his age discrimination claims against Piper. This argument is without merit.

Petitioner contends that the Panel demonstrated a manifest disregard of the ADEA because it ignored the parties' respective burdens of proof under the ADEA. In an ADEA claim, burdens of proof are the same as those for a Title VII action under 42 U.S.C. § 2000e et seq. *Bay v. Times Mirror Magazines*, 936 F.2d 112, 116 (2d Cir. 1991). In a traditional case, where a plaintiff cannot establish the existence of discrimination by direct evidence, a plaintiff must first establish only a *prima facie* case of discrimination by an employer. The employer must then produce a clear and reasonably specific explanation for the challenged employment-related decision, but the burden does not shift to the employer to show that its stated explanation was the true reason. *Bay*, 936 F.2d at 116 (2d Cir. 1991), *citing Price Waterhouse v. Hopkins*, 490 U.S. 228, 245, 109 S.Ct. 1775, 1788, 104 L.Ed.2d 268 (1989).

However, in a case where so-called "direct evidence" is available, courts need not adhere so strictly to this division of burdens of proof. Rather, when a plaintiff has established by direct evidence that an illegitimate factor has played a substantial or motivating role in an employment decision, the burden falls to the defendant to prove by a preponderance of the evidence that it would have made the same employment decision even if it had disregarded the illegitimate factor. However, a plaintiff always bears the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 1093-94, 67 L.Ed.2d 207 (1981).

Here, Petitioner contends that because Mr. Halligan based his claim against Piper on direct evidence of discrimination, Piper bore the burden of proof to show that his claim was without merit. Petitioner alleges that Piper failed to contradict the testimony of Mr. Halligan's witnesses, failed to raise an affirmative defense under the ADEA, and failed to show that Piper would have reached the same decision in the absence of age discrimination. For those reasons, Petitioner argues, the Panel's finding that no discrimination had occurred was made in manifest disregard of the law. In response, Respondents note that they did rebut testimony of Mr. Halligan's witnesses, directly establishing a credibility issue.

Petitioner's argument that the Panel manifestly disregarded the law is meritless for two distinct reasons. First, to show manifest disregard of the law, the Petitioner must demonstrate that the law was clear, that the Panel knew the law, and that the Panel ignored the law. Here, the determination of what constitutes "direct evidence" so that the respondent bears a

heavier burden is a difficult one to make. In addition, the record of the arbitration proceedings does not indicate the Panel's awareness, prior to its determinations, of the standards for burdens of proof. Second, in a situation such as this, where the Panel was faced with the task of evaluating conflicting witness testimony, and where it did not issue a written opinion,[2] I cannot conclude that the Panel did in fact disregard the parties' burdens of proof under the ADEA. There is support for Respondents' argument in the record, although there is also support for Petitioner's claim. Determining the credibility of conflicting witnesses is a key component of an arbitration panel's duty, and crediting one witness over another does not constitute manifest disregard of the law. *Fine v. Bear Stearns & Co., Inc.*, 765 F. Supp. 824, 828 (S.D.N.Y. 1991). This Court's role is not to second-guess the fact-finding done by the Panel. Because there is factual as well as legal support for the Panel's ultimate conclusion, I determine that the Panel did not manifestly disregard the law, and that the arbitration Award should not be vacated on that ground.

C. Whether the Panel Was Guilty of Misconduct or Evident Partiality

A district court may also vacate an arbitration award, pursuant to 9 U.S.C. § 10(a)(2) and (a)(3), respectively, when the arbitrators have demonstrated evident partiality or when

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2. It is well settled that an arbitration panel need not supply a written explanation for its award. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). "Arbitrators are not required to provide the rationale for their award, and 'courts generally will not look beyond the lump sum award in an attempt to analyze the reasoning processes of the arbitrators.' " *Barbier v. Shearson Lehman Hutton Inc.*, 948 F.2d 117, 121 (2d Cir. 1991).

the arbitrators are guilty of either misconduct in refusing to hear evidence pertinent and material to the controversy or of any other misbehavior by which the rights of any party have been prejudiced. Petitioner appears to rest both her claim of misconduct and her claim of evident partiality by the Panel on the same set of facts; I therefore consider these claims simultaneously.

Petitioner's misconduct and partiality claims rest on her allegations that the Panel improperly commented on Mr. Halligan's case, improperly limited Mr. Halligan's rebuttal case, and improperly required Mr. Halligan's counsel to identify rebuttal witnesses in advance. All of these arguments are without merit.

Petitioner relies on a sole comment by the Panel to support her allegations of partiality and misconduct:

> You know, under the rules . . . you don't have as a matter of right the right to rebuttal, a rebuttal case. You have a right of summation.
>
> Now, the panel has decided to give you or permit you the ability to put on a rebuttal case. But are you going to retry this whole case in rebuttal? We've heard almost everything.

TR. 4450-4451.[3] Far from commenting on the merits of the case, this statement by the Panel chairman, taken at its worst, can only indicate a desire by the Panel to restrict testimony to

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3. Citations to the transcript of the arbitration proceeding will be designated at "TR. __."

new information rather than allowing Mr. Halligan to offer redundant testimony. This is a proper motive for the Panel, especially in light of the nature of arbitration as an efficient way to resolve disputes. *See, e.g., Merrill Lynch*, 808 F.2d at 933-34. The Panel's comment, therefore, provides no basis for a finding that it was guilty of misconduct or impartiality.

With regard to Petitioner's argument that the restriction on rebuttal time was an act of misconduct by the Panel and demonstrated the Panel's partiality, I note that as the Panel explained, Mr. Halligan did not have an automatic right to rebuttal in the arbitration proceeding.[4] The Panel granted him rebuttal time, and was entirely within its authority to limit the time to ensure that testimony would be presented in an efficient manner. The Panel granted Mr. Halligan four hours of rebuttal time, and allowed Respondents four hours for cross-examination of rebuttal witnesses. Mr. Halligan's counsel called only two rebuttal witnesses.[5] Although Mr. Halligan's counsel may not have called additional rebuttal witnesses because of the restriction on time set by the Panel, I note that counsel herself stated on the record that any of the proposed rebuttal witnesses "could have been direct witnesses." TR. 4462. For these reasons, the Panel's time restriction did not result in prejudice to Mr. Halligan.

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4. Rebuttal was apparently allowed, when appropriate, under the parties' arbitration agreement. *See* Arbitration Procedures, O'Connell Aff. Ex. V.

5. Respondents note, and Petitioner does not argue to the contrary, that Petitioner apparently did not even use the full four hours allotted by the Panel. Resp. Mem. at 14.

Finally, I note that the Panel's requirement that Mr. Halligan's counsel identify all of her proposed rebuttal witnesses does not rise to the level of misconduct or partiality. Again, the Panel was acting within the scope of its authority to attempt to limit the scope of rebuttal testimony so as not to duplicate testimony already heard. *See, e.g., Grinnell Hous. Dev. Fund Corp. v. Local 32B032J, Serv. Employees Int'l Union*, 767 F.Supp. 63, 67(S.D.N.Y. 1991); *Warnes v. Harvic Int'l, Ltd.*, 1995 U.S. Dist. LEXIS 5844, at *10 (S.D.N.Y. 1995); *Fairchild & Co. v. Richmond F. & P.R. Co.*, 516 F.Supp. 1305, 1315 (D.D.C. 1981).

For the foregoing reasons, I determine that the Panel was not guilty of misconduct or evident partiality.

D. Whether the Award Violates Public Policy

Petitioner alleges, without elaboration, that the Award violates public policy by disregarding Piper's willful and deliberate violation of the ADEA. I construe this to be a further argument in support of Petitioner's allegation that the Panel evinced a manifest disregard of the law. Because I have already determined, for the reasons stated above, that the Panel did not demonstrate a manifest disregard of the law, I find no basis for determining that the Award violates public policy.

E. Whether the Panel Exceeded Its Authority

Pursuant to § 10 of the Arbitration Act, a court may vacate an award if the arbitrators exceeded their powers. . . ." 9 U.S.C. § 10(d). However, the Second Circuit has strictly limited the circumstances under which awards should be vacated:

Appendix D

> We have consistently accorded the narrowest readings to the Arbitration Act's authorization to vacate awards "[w]here the arbitrators exceeded their powers," 9 U.S.C. § 10(d) . . . .

Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 703 (2d Cir. 1978).

Petitioner here challenges the Panel's authority to adjudicate Mr. Halligan's claims after his death, citing New York Civil Practice Laws and Rules ("CPLR") § 7512, which provides that upon the death of a party who has agreed to submit to arbitration, "proceedings may be . . . continued upon the application of, or upon notice to, his executor." Petitioner was named executor in Mr. Halligan's will, but was not formerly designated as the executor until June 5, 1996. Therefore, Petitioner argues, her authorization to continue the arbitration on October 16, 1995 was not valid under CPLR § 7512 and the award must be vacated.

Petitioner discussed the arbitration with Mr. Halligan's counsel immediately after Mr. Halligan's death. Counsel asked whether Petitioner wished to proceed with the arbitration and Petitioner said that she did. Pet. Aff. at ¶ 4. On October 16, 1995, Mr. Halligan's counsel informed the Panel that Mr. Halligan had died and that "the estate represented by the executrix Irene Halligan has authorized our firm to continue this action in the name of the estate." TR. at 4537. Mr. Halligan's counsel, who is now Petitioner's counsel, has stated that she:

> had every reason to believe that a proper substitution had been effected through the offices of the attorney

> who had drawn Halligan's original will and obviously would not have proceeded with this arbitration if there was reason to believe that the arbitrator's powers had been terminated or that the hundreds of hours of legal time they had invested in this arbitration proceeding over two years could be nullified because they had no authority to act on behalf of the Estate.

O'Connell Aff. at ¶ 53. In effect, then, Petitioner seeks to benefit from a technical loophole — that is, Petitioner proceeded, as the executrix, in the arbitration, but now attempts to use the fact that she was not yet *officially* the executrix when she proceeded with the arbitration (although she *currently is* the executrix) to vacate the Award because it is unfavorable to her.

Strong policy concerns dictate that Petitioner's efforts to vacate the Award in this case are inappropriate. As one court has explained,

> To permit a party who has participated fully in the proceedings to later challenge his obligation to arbitrate would be manifestly unfair since the award is otherwise binding on the facts and the law. Having sought expeditious justice in a contractual forum, the losing party may not turn around and upset the arbitration award with a claim that its opponent had foregone its right to arbitration. The public policy favoring arbitration would be greatly undermined were the Court to sustain such a 'heads — I win, tails — you lose' objection.

Boston and Maine Corp. v. Illinois Central RR Co., 274 F. Supp. 257, 260 (S.D.N.Y. 1967). The particular facts of this case

compel the Court to conclude that Petitioner's inconsistent positions in this litigation and in the underlying arbitration are impermissible under the doctrine of equitable estoppel. *See In the Matter of the Petition of Transrol Navegacao S.A.*, 782 F. Supp. 848, 853 (S.D.N.Y. 1991).

Courts "agree that equitable estoppel may be applied to preclude a party from contradicting testimony or pleadings successfully maintained in a prior judicial proceeding."[6] *Id. quoting Konstantinidis v. Chen*, 626 F.2d 933, 937 (D.C. Cir. 1980).[7] In order to successfully argue that an opposing party is estopped from taking a particular position, a party must (1) have been an adverse party in the prior proceeding, (2) have acted in reliance on the opponent's prior position, (3) now face injury if a court were to permit his opponent to change positions. *Id., citing Merrill Lynch, Pierce, Fenner & Smith Inc. v. Georgiadis*, 903 F.2d 109, 114 (2d Cir. 1990). Here, Respondents meet these criteria: they were an adverse party to the arbitration proceeding; they acted in reliance upon Petitioner's statement that the arbitration would go forward; and they will face injury if Petitioner is now allowed to nullify

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6. I note that although there is some question as to whether a party is precluded from taking inconsistent positions when the allegedly inconsistent party did not prevail in the first proceeding, *see Transrol*, 782 F. Supp. at 853, what is relevant here is that Petitioner was successful in representing to the Panel that she was the executrix of the estate, and successful in convincing the Panel to proceed with the arbitration upon her stated approval.

7. Although not technically testimony or a formal pleading, Petitioner's statement to the Panel acted as an authorization to continue the arbitration proceeding that is akin to a pleading substituting Petitioner for her husband in the arbitration proceeding.

the extensive and expensive arbitration proceedings after Respondent obtained a favorable award. For that reason, I now hold that the Award should not be vacated on the ground that the Panel exceeded its authority.

III. Conclusion

For the foregoing reasons, I hereby deny the petition to vacate the Award. I note that currently pending is an application by Respondents in this action to confirm the Award; I will address that application in a later order.

SO ORDERED:

New York, New York
April 14, 1997

s/ Kimba M. Wood
Kimba M. Wood
United States District Judge

Copies of this order have been mailed to counsel for the respective parties.

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED OCTOBER 23, 1998

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 23rd day of October one thousand nine hundred and ninety-eight.

Dkt No: 97-7801

Halligan,

Appellant

v

Piper Jaffray, Inc.

Appellee.

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellee Piper Jaffray, Inc.

Appendix E

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

APPENDIX F — RELEVANT STATUTES

9 U.S.C. § 1

"Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

9 U.S.C. § 2

Validity, irrevocability and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part

thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3

Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4

Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written

agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that

purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 5

Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

Appendix F

9 U.S.C. § 6

Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

9 U.S.C. § 7

Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may

compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 8

Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

9 U.S.C. § 9

Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration

may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

9 U.S.C. § 10

Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration —

(1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

(b) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11

Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was

made may make an order modifying or correcting the award upon the application of any party to the arbitration —

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 12

Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice

of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 13

Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

9 U.S.C. § 14

Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

9 U.S.C. § 15

Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

9 U.S.C. § 16

Appeals

(a) An appeal may be taken from —

(1) an order —

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

(E) modifying, correcting, or vacating an award;

(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or

(3) a final decision with respect to an arbitration that is subject to this title.

(b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order —

(1) granting a stay of any action under section 3 of this title;

(2) directing arbitration to proceed under section 4 of this title;

(3) compelling arbitration under section 206 of this title; or

(4) refusing to enjoin an arbitration that is subject to this title.

No. 98-1172

Supreme Court, U.S.
FILED
FEB 19 1999
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. and MARVIN GEISNESS,

Petitioners,

—v.—

IRENE HALLIGAN, as Executrix of the Estate of THEODORE H. HALLIGAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KATHLEEN M. O'CONNELL
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QUESTION PRESENTED

Whether a securities industry employee who was required to arbitrate his claim of wilful age discrimination, is entitled to vacature of the arbitrators' award where NASD arbitrators, in denying his claim, were shown to have manifestly disregarded either the law or the evidence or both.

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STATEMENT OF THE CASE

Petitioners, Piper Jaffray, Inc., and Marvin Geisness seek a writ of certiorari, to appeal a decision of the U.S. Court of Appeals for the Second Circuit entered July 9, 1998 in *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197. Petitioners' application to this Court was made following the Second Circuit's denial of their motion for rehearing and suggestion of an *en banc* panel. Respondent herein is Irene Halligan, as Executrix of the Estate of Theodore Halligan.

In their unanimous decision, Circuit Judges Feinberg and Kearse and Hon. Barrington Parker, of U.S. District Court for the Southern District of New York, sitting by designation, reversed three orders of the District Court. Those orders which are annexed to Petitioners' brief, had (1) denied Mrs. Halligan's Petition to Vacate an NASD arbitrators' award which had dismissed her decedent's ADEA claim; (2) confirmed the arbitrators' award, and (3) dismissed on *res judicata* grounds, the Estate's ADEA action against Piper Jaffray, Inc.

The Second Circuit's reversal was based its determination that NASD arbitrators had manifestly disregarded either the law or the evidence or both in denying Theodore Halligan's ADEA claim. The Court also remanded the Executrix' Federal action to the District Court for further proceedings consistent with its ruling, stating that there was no *res judicata* bar to that proceeding. The Court noted in its decision that it had authority to remand the case to the arbitrators for a written opinion, but expressly declined to do so, based on the record before the Court. (The Second Circuit Court's decision is appended to Petitioners' brief as Appendix A.)

As shown in the record on Appeal, Respondent's decedent, Ted Halligan, had been employed as an institutional salesman in Piper's New York office for nineteen years, until his employment was terminated on December 31, 1992. (R-399).[1] Mr. Halligan was then 69 years old. During each of the years from 1987 through 1991, Piper had ranked Mr. Halligan as its No. 1 salesperson in commission production. In 1992, Mr. Halligan was ranked Number 5 among some twenty-five other institutional salespersons. (R-330-408).

In the summer of 1992, Mr. Halligan was asked to fly to Minneapolis for an August 27, 1992 luncheon meeting at Piper headquarters, with Tad Piper, CEO of Piper Jaffray and Bruce Huber, Mr. Halligan's immediate superior. At the outset of this meeting, both Bruce Huber and Tad Piper asked Mr. Halligan repeatedly when he was going to retire. Mr. Halligan responded that he was in great physical shape and at the top of his skills as an institutional salesman and had no plans to retire. Tad Piper then attempted to persuade Mr. Halligan to retire, citing the example of his father, Harry Piper. Tad Piper told Halligan that his father *"knew when it was time to turn over the reins to a young whippersnapper, me."* After Halligan pointed out that unlike himself, Harry Piper had $50 million dollars to retire on, Tad Piper finally said to Halligan: *"You're too old, our clients are young and they want to deal with younger salesmen."* Shortly thereafter, Tad Piper left the meeting and Halligan said to Huber, *"It looks like you want me out of here as quickly as possible."* Huber said "*Yes.*" Halligan made notes of this conversation on the trip back to New York. (R-119, R-426-427)

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[1] References are to the record filed in the U.S. Circuit Court of Appeals for the Second Circuit.

Two weeks later, on September 10, 1992, Mr. Halligan received a phone call from Bruce Huber who said to him: *"In accordance with our conversation the other day, we want you out of Piper Jaffray, by the end of the year."* Halligan asked Huber if he would be fired if he did not get out and Huber replied that if he did not resign, both he and Tad Piper would fire him. Halligan asked if he could stay until the end of December and Huber agreed. Mr. Halligan made notes of this conversation. (R-128, R-428)

During the fall of 1992, Mr. Halligan looked for comparable employment without success. (R-428) In October, 1992, Halligan retained counsel. (R-429) In November, his attorney wrote to Tad Piper threatening legal action if Mr. Halligan was fired. (R-130, R-429) About this time, Halligan approached Huber while he was attending a conference in New York City and asked Huber if he could keep his job. Huber said it was out of the question. (R-429)

Huber transferred Mr. Halligan's sales partner, Marvin Geisness, then in his early forties, to Minneapolis, but did not offer Halligan such a transfer. On December 31, 1992, Mr. Halligan was removed from the payroll and the New York office was shut down. (R-451) In January and February 1993, Piper hired two institutional salesmen, Ron Reiches, 41 and Christopher Whitcomb, 27, noting on their personnel records that they were "replacements for Ted Halligan". (R-131, R-132) Halligan filed a claim of age discrimination with the EEOC on January 15, 1993, two weeks after he was fired. (R-351)

In 1991, the U.S. Supreme Court had ruled in *Gilmer v. Interstate Johnson,* 500 U.S. 20, that a securities industry employee who executed a U-4 registration statement, agreeing to arbitrate disputes with his employer, could be compelled to

arbitrate his ADEA claim at the New York Stock Exchange. Mr. Halligan had signed an identical U-4 and was, like Gilmer, registered at both the New York Stock Exchange and the NASD. Moreover, Piper's House Counsel advised Mr. Halligan's counsel in December of 1992 that if Halligan filed an action, Piper would move to compel arbitration. Having no other choice, Mr. Halligan filed his ADEA claim in arbitration at the NASD in October, 1993.

Hearings began at the NASD in September of 1994 and ended in October, 1995. In March, 1996 the arbitrators denied Mr. Halligan's claims without opinion. In or about June of 1996, Respondent Irene Halligan, as Executrix of the late Theodore Halligan, filed a Petition to Vacate the award in arbitration in the U.S. District Court for the Southern District of New York. On October 1, 1996, the Estate filed an ADEA action in the Federal District Court. As stated supra, the District Court confirmed the award and dismissed the lawsuit. Mrs. Halligan then appealed to the Second Circuit.

MISSTATEMENTS IN PETITIONER'S BRIEF

1. Petitioners repeatedly allude in their brief to the "efficiency" of arbitration and its usefulness in allowing parties "to avoid the costliness and delays of litigation". In this case, however, arbitration was neither efficient nor inexpensive. Mr. Halligan was required to pay the NASD $2,000.00 in order to file his claim in arbitration.

Moreover,while the proceedings were conducted on 26 different dates, the average "day" at the NASD consisted of two "sessions" totaling about 5 hours of testimony, the balance of the time being consumed by morning and afternoon breaks and the luncheon recess. Moreover, the arbitrators did not work

beyond 4:00 p.m. and sessions could only be scheduled when the arbitrators' personal schedules permitted. As a result, the case was regularly adjourned for one, two or three month intervals. In July, 1995, the arbitrators adjourned the case for three months, to October 18, 1995. On October 9, 1995, Mr. Halligan died. His widow, Irene Halligan, continued the arbitration which concluded at the end of October, 1995. Doubtless, in a Courtroom, this trial would have taken two weeks.

2. Petitioners' description of the proceedings as "hotly contested" is misleading, as is the term "experienced attorney arbitrators". The proceedings were conducted with great civility at all times. Moreover, according to their resumes, none of the arbitrators had any experience with employment discrimination cases.

3. At page 5 of their brief, Petitioners cite several cases as examples of the similar approach in other Circuits to the Second Circuit's application of the doctrine of manifest disregard of the law. However, not all of these cases concern that doctrine, including *UHC Mgmt. Co. v. Computer Sciences Corp.*, 148 F.3d 992, 998 [concerning modification of an award]; *Trans Chemical Limited v. China National Machinery Import & Export*, 161 F.3d 314, (5th Cir. 1998) [concerning vacature under 9 U.S.C. 10(a)1]; *Baravati v. Josephthal,Lyon & Ross*, 28 F.3d 704, 706 (7th Cir. 1994) [soundly rejecting manifest disregard doctrine].

4. Petitioners also state at ftnt. 4, at page 18 of their brief that the Second Circuit ultimately concluded that Mr. Halligan's claim *"would have been subject to a valid motion to compel arbitration had he attempted to litigate it."* Petitioners have misstated the Court of Appeals' ruling. At ftnt. 2 of its

opinion, (Petitioners' Appendix A, p. 9a) the Court of Appeals ruled that *"In light of our current caselaw, Halligan was correct in considering himself bound to arbitrate."*

REASONS FOR DENYING THE WRIT

The Writ should be denied for three reasons:

(1) The U.S. Court of Appeals for the Second Circuit has not created a new standard of review for vacating awards in arbitration in deciding the *Halligan* case since the Court's decision was based on well recognized standards for judicial review of arbitration awards.

(2) The Second Circuit Court of Appeals did not create a split in the Circuits by its decision in *Halligan v. Piper Jaffray, Inc.* Manifest disregard of the evidence is not the equivalent of erroneous factual findings by arbitrators. No other circuit court has confirmed an arbitrators' award where arbitrators were found to have manifestly disregarded either the law or the evidence presented to them, or both.

(3) For the reasons stated above, the vacature of this arbitration award on the standards utilized by the Second Circuit in this case does not call into question any well settled area relating to judicial review of arbitration awards, nor is it of national significance.

POINT I

NO NEW STANDARD OF JUDICIAL REVIEW WAS CREATED BY THE SECOND CIRCUIT COURT OF APPEALS IN THE *HALLIGAN* DECISION

The Second Circuit's decision does not, as Petitioners contend, "expand the focus of the "manifest disregard" standard beyond arbitrators' conclusions of law and into their findings of fact". To begin with, the NASD arbitrators who heard Mr. Halligan's ADEA claim, made neither findings of fact, nor conclusions of law.

Moreover, the Second Circuit's decision is based on well recognized standards of judicial review. An award in arbitration may be vacated by a Federal Court for any of the reasons contained in the Federal Arbitration Act, 9 U.S.C. 10(a) or where arbitrators manifestly disregard the law in rendering their award. *Wilko v. Swan,* 346 U.S. 427, 436-37 (1953), overruled on other grounds in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

Notably, Petitioners do not contend that the Second Circuit Court of Appeals erred in ruling that NASD arbitrators "manifestly disregarded the law" in the *Halligan* case. Instead, they complain that the Court of Appeals created and utilized an impermissible standard of review called "manifest disregard of the evidence." However, as seen *infra*, this argument is a wholly meritless attempt to wring substance out of form.

As noted by Petitioners, the "manifest disregard of the law" standard is a creature of Federal caselaw and traces its origins to *Wilko v. Swan,* id. In the *Halligan* case, the "law"

which the arbitrators were obligated to enforce was the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, together with those Supreme Court and other Federal Court precedents which have interpreted that statute.

That law has established specific standards of proof for Plaintiffs and Defendants in all employment discrimination cases. *McDonnell Douglas v. Green,* 411 US. 792 (1973); *Texas Dept. Community Affairs v. Burdine,* 450 U.S. 288 (1981); *Price Waterhouse v. Hopkins,* 490 U.S. 288, (1989). Moreover, these evidentiary standards of proof may not be disregarded by arbitrators charged with enforcing Federal statutes. *Mitsubishi Motors Corp. v. Solar Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) ["By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits their resolution to an arbitral, rather than a judicial forum."]

The substantive rights afforded by the ADEA include the Plaintiff's right to establish his *prima facie* case of age discrimination either by direct evidence of age discrimination or by offering a minimum quantum of proof, i.e. by establishing that he was over 40 years of age and thus a member of the class protected under the ADEA, that he was qualified for his job, that he was discharged, and that he was replaced in his job by a significantly younger person. *Benjamin v. United Merchants & Manufacturers,* 873 F.2d 41 (2nd Cir., 1989). When this *prima facie* case is established, a presumption of discriminatory intent arises because the Court presumes that the act of discharge, if unexplained, is more likely than not to be based on the consideration of impermissible factors. *Furnco Construction Corp. v. Waters* 438 U.S. 567, 577 (1978).

Once a *prima facie* case of discrimination is created, the law imposes upon the Defendant the burden of rebutting that presumption by producing evidence that it acted for a non-discriminatory reason. Moreover, Defendant's evidence must be sufficient to raise a genuine issue of fact as to whether it discriminated. *Texas Dept. of Community Affairs v. Burdine* 450 U.S. 248 (1981).

As may be seen, the law requires close analysis of the evidence at every stage of the proceeding, since Plaintiff's failure to establish his prima facie case requires dismissal of the claim and Defendant's failure to rebut the presumption of discrimination requires a directed verdict for the Plaintiff. *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981).

As a consequence, arbitrators who ignore the evidence in an ADEA case perforce ignore the law. The Second Circuit's statement that the arbitrators "either manifestly disregarded the law, or the evidence, or both" is thus not a new standard of review. It is patent that whether an arbitrator who is well aware of the law, refuses to apply the law to the evidence or simply disregards evidence that the law was violated, the result is exactly the same: the arbitrators have manifestly disregarded the law.

Petitioners' brief states at page 11 that "there was intense factual disagreement on virtually every material point, including matters as rudimentary as whether Mr. Halligan was fired or voluntarily resigned." This is not so. In addition to the fact that Mr. Halligan provided overwhelming direct evidence of age discrimination, there was no factual disagreement between the parties as to any of the material elements of Mr. Halligan's *prima facie* case. The record adduced by both sides demonstrated that Halligan established his *prima facie* case

under the *McDonnell Douglas* paradigm, but that Piper nonetheless failed to rebut the presumption of discrimination created by that *prima facie* case, or even to articulate, much less establish, a non-discriminatory reason for Halligan's discharge.

Halligan, at age 69, was clearly in the protected class of ADEA plaintiffs. Also, Piper did not deny that within weeks of Halligan's discharge it hired two younger institutional salesmen (ages 27 and 41) as "replacement(s) for Ted Halligan". (R-131, 132) Moreover, even Piper agreed that Halligan was qualified for his job:

> "Piper has never tried to show in any way that Mr. Halligan was incompetent or unsatisfactory." (From summation argument by Piper Jaffray at NASD, (R-700).

As to whether he was "fired" on September 10, 1992, as Halligan testified, or had opted to "retire" on that date, as Piper claimed, as seen *infra*, even the testimony of Piper witness, Bruce Huber, established that Halligan was fired.

Thus, Petitioners' contention that the only possible reading of the Second Circuit's opinion is that "it created and applied a heightened inquiry into the factual underpinnings of arbitral awards" is meritless. The Second Circuit was required to review this case to assure that the arbitrators complied with the requirements of the statute. Faced with overwhelming evidence of age discrimination including direct evidence of age discrimination from at least four witnesses, it hardly required "heightened scrutiny" for the Court to ascertain that justification for the denying relief under the ADEA could not be found in this record.

Moreover, it is clear from the Second Circuit's opinion that it intended to and did apply the manifest disregard of the law standard, in vacating the arbitrators' award. As the Court stated in its opinion: [2]

> "Mrs. Halligan argued in the district court and repeats to us that the arbitration award reflected manifest disregard of the law. Mrs. Halligan makes a strong case for that proposition. Quite simply, Halligan presented overwhelming evidence that Piper's conduct after Tad Piper became CEO was motivated by age discrimination.
>
> * * *
>
> "Moreover, this is not a case like DiRussa where we refused to find "manifest disregard" because DiRussa had not sufficiently brought the governing law to the attention of the arbitrators. There is no such problem here." (Petitioners' Appendix A, p. 16b)

It should also be noted that arbitrators who "manifestly disregard evidence" risk vacature of their award for that reason alone, under the Federal Arbitration Act (FAA) 9 U.S.C. Sec. 10(a)3. FAA Sec. 10(a)3 provides that an arbitrator's award may be vacated whenever arbitrators are guilty of any misconduct which is prejudicial to the rights of a party, including refusing to hear evidence which is pertinent and material to the controversy. See *In Matter of the Arbitration*

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[2] The full text of the Second Circuit Court's opinion in *Halligan v. Piper Jaffray, Inc.*, is annexed to Piper Jaffray's Petition as Appendix A.

between Tempo Shain Corporation v. Bertek, Inc., 120 F.3d 16 (2d Cir., 1997). [Arbitrators' award vacated because arbitrators had no reasonable basis for refusing to permit witness to testify.] Clearly, for arbitrators to manifestly disregard evidence is the equivalent of refusing to hear evidence and would doubtless constitute arbitrator misconduct of equal gravity, warranting vacature under 9 U.S.C. 10(a)3.

POINT II

THE SECOND CIRCUIT DID NOT INTRUDE ON THE ARBITRATORS' ROLE AS FACT FINDER.

Second Circuit precedents demonstrate full support for the longstanding Federal policy favoring arbitration of disputes. Indeed, no other Circuit Court has more narrowly applied the manifest disregard of the law standard. See *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (2d Cir. 1997); [If there is even a barely colorable justification for the outcome reached, reviewing Court must confirm the award.] *Di Russa v. Dean Witter Reynolds, Inc.* 121 F.3d 818, (2d Cir., 1997), cert. denied, 118 S.Ct. 1695 (1998). [Although the ADEA mandates an award of reasonable attorneys' fees in addition to judgment, arbitrators held not to have manifestly disregarded the law in denying such fees, since it was plausible that arbitrators understood the phrase "entitled to", as meaning they should exercise their discretion to award attorneys' fees.]

Following its decision in the *Halligan* case, the Second Circuit has continued to adhere to its narrow interpretation of the "manifest disregard of the law" standard and has, moreover, specifically declined to apply a heightened standard of review in

cases of statutory claims submitted to arbitration. In an unpublished opinion in *Chisolm v. Kidder, Peabody Asset Management, Inc.*, 1998 U.S. App. Lexis 22385, (Respondent's Appendix A), filed two weeks after the *Halligan* decision, the Second Circuit refused to vacate an NASD arbitrators' award which denied Plaintiff's claim of age discrimination.

The Plaintiff in *Chisolm* contended that the District Court had erroneously rejected his argument that the "manifest disregard of the law standard" should not be applied to cases where arbitrators construed Federal statutes, but instead there should be heightened scrutiny of such awards. In *Chisolm v. Kidder Peabody Asset Mgmt.*, 966 F. Supp. 218 (SDNY 1997) Judge Constance Baker Motley had, in a lengthy opinion, confirmed the arbitrators' award on the manifest disregard standard, and declined to apply a heightened standard of review. The Court of Appeals for Second Circuit affirmed, stating:

> "It is well settled in this Court that a District Court may vacate an award in arbitration if it is in manifest disregard of the law; however the reach of that doctrine is severely limited. (citing) *Halligan v. Piper Jaffray, Inc.* ... 1998 WL 38559 at *5 (2d Cir., 1998). (Respondent's Appendix A)

The Court further stated that, unlike the *Halligan* case, the NASD arbitrators in *Chisolm* were not shown to have manifestly disregarded the law in denying Plaintiff's ADEA claim, because the record contained ample evidence from which they could have concluded that the Defendant had a legitimate, non-discriminatory motive for discharging Plaintiff.

The *Chisolm* case, which was not cited by Petitioner in its brief, clearly demonstrates that the Second Circuit continues to apply the narrow manifest disregard of the law standard of judicial review for statutory claims submitted to arbitration. It also demonstrates that the Second Circuit decided *Halligan* under that narrow standard and did not, despite Petitioners' contention, "alter the existing standard of review" for such awards.

While the manifest disregard standard is quite narrow, it is not, as Petitioners seem to think, merely an illusion. As the Second Circuit noted in *Chisolm*: ***"We have recently demonstrated in Halligan that the manifest disregard standard is not without teeth".***

It is also clear from the Second Circuit decisions cited above, that justification for an award, even if barely colorable, must be sourced in the record, and not in speculation as to why the arbitrators might have made the award.

Petitioners' contention that the arbitrators' denial of Mr. Halligan's ADEA claim was based on witness credibility is just such speculation, because nothing in the record supports that conclusion.

Indeed, the record shows that the only significant conflict in the case, i.e., as to whether Halligan had voluntarily resigned or was fired was more apparent than real.

Piper witness Bruce Huber initially testified that Halligan told him on September 10, 1992, that he *would* retire at the end of December, during a phone conversation. (R-483) Huber also testified, however, that Halligan had changed his mind about retiring by mid-November, 1992 when he met Halligan in New York at a business conference. Huber testified

that Halligan asked if he could keep his job at this time and that he told Halligan that he could not stay because it was too late to reconsider, since plans had already been made to close the New York office. (R-492, p. 2468)

These "plans" consisted of giving notice to Halligan's secretary and the receptionist. Huber also admitted that he did not offer Halligan an opportunity to work out of the Minneapolis office, although Huber transferred Halligan's partner, Marvin Geisness, to Minneapolis where he continued to cover New York accounts. (R-492, p. 2467). Huber closed down the New York office on December 31, 1992 and removed Halligan from the payroll. (R-492, p. 2471).

Thus, Huber's own evidence, even if believed, also proved that Halligan was fired and did not resign. Huber testified that Halligan said he *would* resign in December 1992, but had changed his mind about resigning by November, 1992. Piper does not dispute that Halligan was still employed in November of 1992 when Huber told him he could not keep his job. Thus even Huber confirmed that Halligan did not resign, but was discharged as of December 31, 1992, the only issue being whether Halligan was fired on September 10, 1992 as Halligan testified, or if Huber's testimony were credited, in November of 1992 when Huber told Halligan he had to leave.

Moreover, Petitioner points to nothing in the record which would support its conclusion that the arbitrators did not believe Halligan's witnesses. Nor can such a conclusion be reasonably inferred from this record. As may be seen from the Court of Appeals' opinion in *Halligan* there was nothing in the record to support such an inference:

> "Piper argues that the arbitration panel resolved the case in accordance with the substantive

> ADEA statute, for example, it credited Piper's witnesses instead of Halligan's. Had the arbitrators offered that explanation of the award, on this record it would be hard to accept—but they did not even do that." (Patitioner's Appendix A, 17a)

As stated in the Court's opinion, Huber was contradicted by other Piper witnesses on key elements of his testimony. The Court noted that while Bruce Huber testified that Halligan's partner, Marvin Geisness, was not informed of the August 27, 1992 meeting among Tad Piper, Bruce Huber and Ted Halligan before it took place, Geisness testified that he had discussed the August 27th meeting with Huber beforehand and had asked him not to close the New York office.

While the Court of Appeals cited only one example of such contradictory testimony, the record before the Court disclosed several other instances in which Huber's testimony was contradicted by Piper witnesses.

In sharp contrast to Piper's witnesses, none of Halligan's witnesses contradicted one another. Moreover, as Mrs. Halligan pointed out to the District Court and the Court of Appeals, Piper's main witnesses, Tad Piper and Bruce Huber confirmed the accuracy of major portions of Halligan's testimony regarding their conversations at the luncheon meeting of August 27, 1992. (R-681-683) Thus, a reviewing Court looking for justification based on "credibility" of witnesses could not find "even a barely colorable justification" for the award on this ground in the record of the *Halligan* case.

POINT III

THE SECOND CIRCUIT'S DECISION DOES NOT REPRESENT A SPLIT IN THE CIRCUITS NOR IS IT OF NATIONAL SIGNIFICANCE.

Petitioners' claim that the Second Circuit's opinion in *Halligan v. Piper Jaffray, Inc.*, creates a split in the Circuits is wholly erroneous. No other Circuit Court has permitted an arbitration award to stand where arbitrators have either manifestly disregarded the law or the evidence or both in deciding a claim in arbitration. Moreover, Petitioners cite no case in which errors in fact made by arbitrators have been deemed to be the equivalent of a manifest disregard of the evidence by any Court.

The Second Circuit's vacature of the arbitrators' award in *Halligan* is clearly based upon precepts set out in the Supreme Court's decision in *Gilmer v. Interstate Johnson*, 500 U.S. 20 (1991):

> "...in *Gilmer*, when the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, the Court did so on the assumptions that claimant would not forego the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in arbitration. 500 U.S. 26,28. This case puts those assumptions to the test. The Court also stated in *Gilmer* that "claimed procedural inadequacies" in arbitration "are best left for resolution in specific cases." 500 U.S. at 33. At least in the

> circumstances here, we believe that when a reviewing Court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account. Having done so we are left with the firm belief that the arbitrators here manifestly disregarded the law, or the evidence or both." (Petitioners' Appendix A, 16a, 17a.).

As seen *supra*, the Court's decision to take the absence of an arbitrators' opinion into consideration in determining whether the arbitrators manifestly disregarded the law, is tailored to the unique circumstances presented by the *Halligan* case and based on the clear teaching of *Gilmer* that claimed procedural inadequacies are best left for resolution in specific cases.

Thus, Petitioners' contention that after *Halligan v. Piper Jaffray*, arbitrators who decline to issue opinions in close cases will "do so at their peril," is totally unfounded. The Second Circuit specifically stated in *Halligan*, that its ruling was not intended to require that arbitrators write opinions:

> "We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing Court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation if given, would have strained credulity, the absence of explanation may reinforce the reviewing Court's confidence that the arbitrators engaged in

> manifest disregard of the law. (Petitioners' Appendix A, p. 17a)

As can be seen, the Second Circuit's opinion neither requires arbitrators to write opinions, nor does it pose a threat to the finality of arbitration in the United States. Moreover, its opinion is wholly consistent with the Supreme Court's decision in *Shearson American Express v. McMahon* 482 U.S. 220, 232 (1987) which assures a judicial review of statutory claims submitted to arbitration which is sufficient to assure that the statute was enforced in arbitration. The Second Circuit's ruling in *Halligan* is also consistent with the Supreme Court's earlier ruling in *Wilko v. Swan,* 346 U.S. 427, (1953) overruled on other grounds in *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477 (1989), which permits vacature of awards which are made in manifest disregard of the law.

CONCLUSION

Ted Halligan submitted his ADEA claim to arbitration in 1993, because he believed himself compelled to do so by the Supreme Court's decision in *Gilmer v. Interstate Johnson*, 500 U.S. 20 (1991). In so doing, he relied on the Supreme Court's assurances that he was entitled to a judicial review of the arbitrators' decision on that claim which would be sufficient to ensure that his statutory rights were vindicated in arbitration.

Petitioners now seek to nullify Mr. Halligan's right to such judicial review, but not on the grounds that NASD arbitrators properly denied Halligan's ADEA claim. Rather, Petitioners' concern is that some other litigant who was compelled to arbitrate a statutory claim of employment discrimination may be emboldened by *Halligan* to seek review of an arbitrators' award. In Respondent's view, that motive is not worthy of consideration

by this Court in determining whether a writ of certiorari should issue in this case. Wherefore, Respondent, Irene Halligan, as Executrix of the late Theodore Halligan, respectfully requests that this petition for a writ of certiorari be denied in all respects.

Respectfully submitted,

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Counsel of Record
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Appendix A

APPENDIX A—OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT CHISOLM v. KIDDER PEABODY ASSET MGMT., DATED AND DECIDED JULY 28, 1998

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 28 day of July one thousand nine hundred and ninety eight

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PRESENT: RICHARD J. CARDAMONE,
JOSÉ A. CABRANES,
GERALD W. HEANEY,*
Circuit Judges,

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* Of the United States Court of Appeals for the Eighth Circuit, sitting by designation

Appendix A

O. BIERNE CHISOLM
Plaintiff-Appellant,

v. No. 97-7828

KIDDER, PEABODY ASSET MANAGEMENT, INC. and KIDDER, PEABODY & CO.INC.,
Defendants-Appellees,

APPEARING FOR APPELLANT:
JEFFREY L. LIDDLE, Liddle & Robinson LLP, New York, New York

APPEARING FOR APPELLEES:
MARK S. DICHTER, Morgan, Lewis & Bockius LLP, Philadelphia, Pennsylvania

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This cause came on to be heard on January 26, 1998 on the transcript of record from the United States District Court for the Southern District of New York (Constance Baker Motley, *Judge*) and was argued.

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the District Court be and it hereby is AFFIRMED.

Plaintiff, a former employee of Kidder, Peabody & Co., Inc. ("Kidder, Peabody"), commenced this action to redress alleged age discrimination by defendants, seeking relief under the Age Discrimination in Employment Act of 1967, § 2 *et seq.*, as amended, 29 U.S.C. § 621 *et seq.*, (the "ADEA"). Plaintiff claims that, after a career that spanned several decades at Kidder, Peabody, he was constructively discharged due to the actions of George Grune, the 35-year-old director of Kidder, Peabody Asset Management, Inc., who allegedly demonstrated favoritism toward

younger executives, significantly diminished plaintiff's job responsibilities, and denied him a bonus in 1991 (which, in the previous years, had constituted approximately 40-50% of plaintiff's salary). In response, plaintiff resigned, later claiming constructive discharge.

In 1991, plaintiff filed an action in New York Supreme Court alleging state law claims, and defendants moved to stay the action and compel arbitration.[1] The court granted defendants' motion and compelled arbitration, whereupon plaintiff filed the instant action, alleging violation of the ADEA in district court in January 1992. Once again, defendants moved for a stay, and the district court granted the motion and compelled arbitration. After 43 hearing sessions before an arbitration panel of the National Association of Securities Dealers, the panel dismissed plaintiff's claims in their entirety without issuing findings of fact, conclusions of law, or the rationale behind its decision. On May 29, 1997, the district court affirmed the decision of the arbitration panel. *See Chisolm v. Kidder, Peabody Asset Management, Inc.*, 966 F. Supp. 218 (S.D.N.Y. 1997). From this judgment, plaintiff appeals, arguing that the district court erroneously rejected his argument that the "manifest disregard of the law" standard for vacating an arbitration award should not apply in cases where arbitrators construe federal statutes rather than decide issues typical of commercial or labor disputes.

"In reviewing a district court decision confirming an arbitration award, we review legal conclusions *de novo* and findings of fact for clear error." *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1998).

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[1] In order to be registered with various securities exchanges as a securities representative, plaintiff was required to sign the Uniform Application for Securities Industry Registration Form, which contained an arbitration agreement.

Accordingly, we review *de novo* the legal issue of whether the district court applied the correct standard of review to the arbitration panel's decision. *See First Options v. Kaplan*, 514 U.S. 938, 948 (1995). It is well settled in this Circuit that a district court may vacate an arbitration award if it is in "manifest disregard of the law"; however, the "reach of the doctrine is "severely limited." *Halligan v. Piper Jaffray, Inc.*, No. 97-7801, 97-7839, 1998 WL 385539, at *5 (2d Cir. July 9, 1998) (quoting *Government of India v. Cargill, Inc.*, 867 F.2d 130, 133 (2d Cir. 1989).[2] Such manifest disregard "clearly means more than error or misunderstanding with respect to the law." *Id.* (quoting *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933 (2d Cir. 1986). Specifically, a court should not vacate an award unless it finds "both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored

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[2] In addition, the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, provides that an arbitration award may be vacated.

(1) Where the award was procured by corruption, fraud or other undue means.

(2) Where there was evident partiality or corruption in the arbitrators....

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual final, and definite award upon the subject matter submitted was not made.9 U.S.C. § 10(a)(1)-(4). These statutory provisions do not pertain to the circumstances of this appeal.

by the arbitrators was well defined, explicit and clearly applicable to the case." *Id.*

We have recently demonstrated in *Halligan* that the "manifest disregard" standard is not without teeth. See 1998 WL 385539. However, in the circumstances here presented, we do not find a basis for concluding that the arbitration panel "ignored the law or the evidence or both." *Id.* at *7. Unlike *Halligan*, where there was "strong evidence that Halligan was fired because of his age, *Id.*, there was "ample basis [in the instant case] from which to conclude that...plaintiff was not constructively discharged," and even assuming, *arguendo*, that he was, "there [was] also evidence from which the arbitrators could have concluded that defendants had legitimate, nondiscriminatory reasons for doing so." *See Chisolm*, 966 F. Supp.at 228-29.

Having carefully considered all of plaintiff's arguments on appeal, we AFFIRM the judgment of the district court in its entirety, substantially for the reasons stated by Judge Motley in her opinion. *See Chisolm*, 966 F. Supp. at 218.

FOR THE COURT
Carolyn Clark Campbell, Clerk

By Lucille Carr /s/

Appendix B - Relevant Statutes

Sec. 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive, or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

MOTION FILED

FEB 2 2 1999

No. 98-1172

In the Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. AND MARVIN GEISNESS,
Petitioners,

v.

IRENE HALLIGAN, AS EXECUTRIX OF THE ESTATE OF THEODORE H. HALLIGAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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OCTOBER TERM, 1998

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IRENE HALLIGAN, AS EXECUTRIX OF THE ESTATE OF THEODORE H. HALLIGAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37.3 of the Rules of this Court, the Securities Industry Association ("SIA") respectfully moves for leave to file the attached brief as *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief. This motion is made necessary by the refusal of respondent to consent to this filing.

The SIA is an association whose members include more than 740 securities firms situated throughout North America. SIA members—including investment banks, broker-dealers, and mutual fund companies—are active in all markets and in all phases of corporate and public finance.

Many SIA member firms use arbitration to resolve a wide range of disputes, including disputes with employees, customers, and other securities firms. The SIA therefore has a compelling interest in preserving the utility of arbitration as a means of resolving disputes without the aid of the courts. Indeed, it is because of this significant interest that the SIA has participated as *amicus curiae* in several notable arbitration cases in which varied aspects of the arbitration process were at issue. *See First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52 (1995); *Gilmer v. Interstate/Johnson Corp.,* 500 U.S. 20 (1991); *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477 (1989); *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213 (1985).

The court of appeals in this case, by conducting its own independent review of the evidentiary record of an arbitration proceeding and on that basis vacating an arbitration award, has placed in jeopardy the future usefulness of arbitration as an alternative dispute resolution device. The simple fact is that, if arbitration comes to be viewed as merely a "warm-up" for subsequent judicial proceedings, the advantages of arbitration will be lost (or at least severely diminished), and parties will be discouraged from using arbitration as a means of resolving their disputes. The SIA therefore seeks leave to file this brief in support of petitioners' request for review.

As the attached brief explains in greater detail, the court of appeals' new standard of review is an unprecedented departure from prior law, and conflicts with decisions of this Court and the decisions of other courts of appeals. With a membership that includes many frequent users of arbitration, the SIA has a strong interest in defending existing law on the narrow scope of judicial review of arbitration awards and in ensuring that that law is not changed, in the leading financial and commercial jurisdiction in the country, by a single court of appeals panel.

Accordingly, the SIA respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* in support of petitioners be granted.

Respectfully submitted,

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February 22, 1999

QUESTION PRESENTED

Whether, given the strong federal policy favoring arbitration and the extremely narrow grounds for vacatur enumerated in the Federal Arbitration Act, 9 U.S.C. § 10, the court of appeals erred in vacating an arbitration award under a new standard that permits the court to conduct its own independent review of the evidentiary record of the arbitration proceeding and on that basis to determine that the arbitrators manifestly disregarded *the evidence* in rendering the award.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-1172

PIPER JAFFRAY, INC. AND MARVIN GEISNESS,
Petitioners,

v.

IRENE HALLIGAN, AS EXECUTRIX OF THE ESTATE OF THEODORE H. HALLIGAN,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF AMICUS CURIAE OF THE SECURITIES INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The Securities Industry Association ("SIA") is a trade association that represents more than 740 securities firms. SIA members—including investment banks, broker-dealers, and mutual fund companies—are active in all markets and in all phases of corporate and public finance. SIA members manage the accounts of more than 50 million investors directly and tens of millions investors indirectly through corporate, thrift, and pension plans.[1] The industry generates approximately $270 billion of revenues yearly in the U.S. economy and employs more than 380,000 individuals.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, contributed monetarily to the preparation or submission of this brief.

Many SIA member firms use arbitration to resolve a broad range of disputes, including disputes with employees, customers, and other securities firms. Many employees of SIA member firms agree to arbitrate employment disputes when they register with a self-regulatory organization, such as the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"), whose rules require arbitration of many employment claims.[2] Other employees of SIA member firms agree to arbitrate employment disputes by entering into private arbitration agreements with their firms. Similarly, many customers of SIA member firms agree to arbitrate customer disputes. During the period 1994 to 1996, an average of 6,771 arbitration cases were filed each year involving securities firms. *See SRO Arbitration Figures,* Sec. Arb. Commentator, Oct. 1997 at 15 (con-

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[2] All securities industry employees who apply to become a registered representative with the NYSE or the NASD execute a Uniform Application for Securities Industry Registration or Transfer, commonly known as a "Form U-4." Although the NYSE and the NASD recently enacted rule changes under which registered employees are no longer required to arbitrate statutory discrimination claims *solely* on the basis of having signed a Form U-4, such claims will still be arbitrated before the NASD where the employee and employer have separately agreed, either before or after the dispute arose, to arbitrate such claims. (The NYSE also will continue to accept arbitration disputes involving statutory discrimination claims, but only under post-dispute arbitration agreements.) In addition, all other employment-related claims (*e.g.*, breach of contract, wrongful discharge, compensation, defamation, and other tort claims) are still subject to mandatory arbitration before the NASD and the NYSE by virtue of the Form U-4. NASD Code of Arbitration Procedure, Rule 10,201 (as amended by Order Granting Approval to Proposed Rule Changes Relating to the Arbitration of Employment Discrimination Claims, Exchange Act Release No. 40,109, 63 Fed. Reg. 35,299 (June 22, 1998)); NYSE Rules 347, 600 (as amended by Order Approving Proposed Rule Change by the NYSE Relating to Arbitration Rules, Exchange Act Release No. 40,858, 64 Fed. Reg. 1051 (Jan. 17, 1999)).

taining statistics regarding filings of arbitrations with seven major securities exchanges nationwide).

Given their reliance on arbitration as an effective and efficient means of resolving disputes in a wide variety of legal and factual contexts, SIA members have a strong interest in preserving the desirable features of arbitration and ensuring its viability as an alternative to court litigation. This interest is particularly acute in the Second Circuit, where the nation's financial center is located and the largest number of arbitration cases involving the securities industry are brought. Because the court of appeals' decision in this case threatens the utility of arbitration as a means of resolving disputes without the aid of the courts, the SIA submits this brief to urge the Court to grant the petition and address the detrimental implications of the Second Circuit's decision for the strong federal policy favoring arbitration and the finality of arbitration awards.

REASONS FOR GRANTING THE PETITION

THE SECOND CIRCUIT'S NEW STANDARD OF REVIEW CONFLICTS WITH DECISIONS OF THIS COURT AND THE DECISIONS OF OTHER COURTS OF APPEALS, AND PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT THIS COURT SHOULD DECIDE

In vacating the arbitration award in this case, the court of appeals departed substantially from the narrow standards for judicial review established by Congress and historically recognized by this Court and the courts of appeals. The court of appeals overturned the result of a lengthy and vigorously contested arbitration on the basis of the court's own independent review of the evidentiary record of the arbitration proceeding. Concluding that the arbitrators manifestly disregarded *the evidence*, the court decided that the award could not stand. The court cited no precedent for this intrusive mode of judicial review, and independent research has identified none.

The novel ruling below has the potential to undermine the finality of *all* arbitration awards—not only in the Second Circuit, not only in the securities industry, and not only in employment cases. If left undisurbed, the court of appeals' decision likely will result in courts throughout the nation being asked by all manner of parties who are disappointed with the results of arbitration to review the evidentiary record from the arbitration proceeding to determine whether the arbitrator(s) manifestly disregarded *the evidence* in rendering the award. This will be true even for disputes involving basic common law principles (*e.g.*, contract disputes) or where small amounts are in controversy.

The court of appeals' new manifest disregard of *the evidence* standard thus has the potential of turning the judiciary into super-arbitrators, with courts sorting through hundreds of exhibits and thousands of pages of transcripts to respond to arguments that arbitrators incorrectly discerned the facts and weighed the evidence. Such an intrusive standard of review is clearly inconsistent with the strong federal policy favoring arbitration, and the interests of efficiency and finality that policy promotes.

The decision below conflicts with decisions of this Court and the decisions of other circuits. It injects a new and unpredictable element into judicial review of arbitration awards, a subject that previously had been reasonably well settled. Thousands of parties to arbitration proceedings (and hundreds of thousands, if not millions, of parties to arbitration agreements) are now faced with uncertainty concerning the finality of arbitration awards. Whether factual findings by arbitrators will remain final and not subject to review, or whether federal courts will conduct independent reviews of evidentiary records to determine whether the arbitrators manifestly disregarded *the evidence* is not a matter that should vary from circuit to circuit. The Federal Arbitration Act plainly contemplates a national standard, and the court of appeals' departure from

that standard in this case is sufficiently serious to warrant review by this Court.

A. The Importance of Finality to the Strong Federal Policy Favoring Arbitration

When the Federal Arbitration Act ("FAA") was enacted in 1947, it severely limited the circumstances under which an arbitration award could be vacated. The specific narrow grounds for vacating an arbitration award under the FAA are: (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators; (3) where the arbitrators were guilty of misconduct for refusing to hear pertinent evidence or failing to postpone the hearing for good cause; or (4) where the arbitrators exceeded their powers. 9 U.S.C. § 10.[3] In addition to the grounds for vacatur enumerated in the FAA, courts have held that an arbitration award can be vacated if the arbitrators "manifestly disregarded *the law*" in reaching their decision. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) (emphasis added).

In accordance with the FAA and the strong federal policy favoring arbitration, courts have severely limited their review of arbitration awards and thus promoted the twin goals of arbitration, namely, achieving finality efficiently and effectively, and avoiding long and expensive litigation. *See Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993).

This Court and the lower federal courts have uniformly recognized that to serve these goals, arbitration awards must be subject only to the most narrow review. *See First Options of Chicago*, 514 U.S. at 942 ("the court

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[3] The FAA was originally enacted in 1925 as the United States Arbitration Act, ch. 213, 43 Stat. 883 (1925), and was then reenacted and codified in 1947 as Title 9 of the United States Code. *See* Federal Arbitration Act, ch. 392, 61 Stat. 670 (1947).

will set [an arbitration] decision aside only in very unusual circumstances[,]" namely, under § 10 of the FAA or under the "manifest disregard of the law" standard); *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 n.5 (4th Cir.) ("Th[e] narrow standard of review [of arbitration awards] is necessary to preserve the benefits of arbitration, to wit, reduced delay and expense [and] to prevent arbitration from becoming a preliminary step to judicial resolution"), *cert. denied*, 119 S. Ct. 178 (1998); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("A restrictive standard of review is necessary to preserve these benefits [of arbitration] and to prevent arbitration from becoming a preliminary step to judicial resolution") (citation omitted); *Folkways Music Publishers*, 989 F.2d at 111 (narrow judicial review preserves the "twin goals of arbitration [—] settling disputes efficiently and avoiding long and expensive litigation"); *Alhambra Foundry Co. v. General Warehousemen's Union, Local 598*, 687 F.2d 287, 290 (9th Cir. 1982) (limited judicial review of arbitration awards is necessary to " 'obviate[] the enormous burden which would rest upon the judiciary if it should be required to settle, case by case, the endless number of . . . disputes . . . which inevitably occur between employers and employees' ") (quoting *Arco-Polymers, Inc. v. Local 8-74*, 671 F.2d 752, 755 (3d Cir. 1982)).

As the Fourth Circuit aptly recoginzed:

> Opening up arbitral awards to myriad challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. As the Seventh Circuit put it, "[a]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party."

Remmey v. PaineWebber, Inc., 32 F.3d 143, 146 (4th Cir. 1994) (quoting *National Wrecking Co. v. International Bhd. of Teamsters, Local 731*, 900 F.2d 957, 960 (7th Cir. 1993)); *see* Jose A. Cabranes, *Arbitration and U.S. Courts: Balancing Their Strengths*, 70 N.Y. St. B.J. 22, 23 (Mar./Apr. 1998) ("Everyone understands that the many advantages of arbitration would quickly evaporate if arbitration proceedings were treated as mere pretrial hearings—warm-ups for the parties' day in court"); Kenneth R. Davis, *When Ignorance of the Law is No Excuse: Judicial Review of Arbitration Awards*, 45 Buff. L. Rev. 49, 85 (1997) ("A key component of arbitration's simplified procedures, the narrow scope of review preserves the economy of arbitration by supporting the finality of awards.").

The rationale behind this extremely limited standard of review lies in the strong federal policy favoring arbitration as an alternative to litigation. As this Court declared in 1854:

> Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal . . . . If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the [Court] in place of the [arbitrators] chosen by the parties, and would make an award the commencement, not the end, of litigation.

Burchell v. Marsh, 58 U.S. (17 How.) 344, 349 (1854). More than 130 years later, this Court reaffirmed these principles and again made it clear that courts "play only a limited role when asked to review the decision of an arbitrator" and "do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 36, 38 (1987); *see also Gilmer v. Interstate/Johnson Lane*

Corp., 500 U.S. 20, 26, 31 (1991) (by agreeing to arbitrate, the parties " 'trade[] the procedures *and opportunity for review* of the courtroom for the simplicity, informality, and expedition of arbitration' ") (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (emphasis added)); *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 203 (1956) ("judicial review of an [arbitration] award is more limited than judicial review of a trial").

B. The "Manifest Disregard of the Law" Standard Is "Severely Limited" and Did Not Provide a Basis for Vacatur in This Case

Consistent with the FAA and the strong federal policy favoring arbitration, the reach of the manifest disregard of *the law* doctrine has been viewed as "severely limited," *see Government of India v. Cargill, Inc.*, 867 F.2d 130, 133 (2d Cir. 1989) (quotation omitted), and as requiring "more than error or misunderstaning with respect to the law." *See DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997), *cert. denied*, 118 S. Ct. 695 (1998) (quotation omitted); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker*, 808 F.2d 930, 933-34 (2d Cir. 1986). To vacate an award for manifest disregard of the law, a reviewing court must find that the arbitrators consciously disregarded a well-defined, explicit, and clearly applicable rule of *law*, in that they were made aware of the rule but chose not to apply it. *See, e.g., DiRussa*, 121 F.3d at 821; *Health Servs. Management Corp. v. Hughes*, 975 F.2d 1253, 1267 (7th Cir. 1992) (award is in manifest disregard of the law if the arbitrator deliberately disregards what he knows to be the law); *Bobker*, 808 F.2d at 933-94.

Here, the court of appeals did not identify a single legal error made by the arbitration panel. It also did not identify any law or legal principle it believed the arbitrators misunderstood, misapplied, or disregarded—

manifestly or otherwise. Indeed, there was no disagreement between the parties regarding the applicable law in this case; the only dispute was over the facts. Pet. App. 15a-16a. Moreover, as more fully explained below, the court of appeals' opinion clearly demonstrates that its decision to vacate the award in this case was based entirely on the court's disagreement with the arbitrators' credibility determinations and weighing of *the evidence*, and not on any perceived refusal by the arbitrators to apply *the law*. *See United States v. Farragut*, 89 U.S. (22 Wall.) 406, 421 (1874) ("There is no evidence here of any misapprehension of the law governing [the case,] and it must obviously have been one mainly of fact, and the award, is therefore, conclusive.").

C. The New Standard of Review Announced By The Second Circuit Conflicts With The Decisions of This Court and Those of Other Courts of Appeals

This Court and the lower federal courts have reviewed arbitration awards under the standards enumerated in the FAA and for manifest disregard of *the law* for many decades. In its decision below, however, the court of appeals enunciated a new standard of review that considers not only whether the arbitrators manifestly disregarded *the law*, but also whether they disregarded *the evidence*. Applying this new standard, the court conducted its own independent review of the record of the arbitration proceeding and determined that the award should be vacated because "the arbitrators here manifestly disregarded the law or the evidence or both." Pet. App. 16a, 17a.

As more fully explained in the petition, this case involved a challenge to a NASD arbitration award in which the panel rejected an age discrimination claim after 26 days of hearing during which 25 witnesses testified. The district court confirmed the award, holding that where, as here, the arbitration panel "was faced with a task of

evaluating conflicting witness testimony, . . . [d]etermining the credibility of conflicting witnesses is a key component of an arbitration panel's duty, and . . . [t]his Court's role is not to second-guess the fact-finding done by the [arbitrators]." Pet. App. 33a.

The court of appeals ignored these conclusions. The court conducted its own review of the evidentiary record of the arbitration proceeding and found that Halligan had presented what the court variously described as "strong," "very strong," "powerful," and "overwhelming" evidence to support his claims. Pet. App. 4a, 15a, 16a. The court then concluded that "[i]n view of the *strong evidence* that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that [the panel] ignored the law or the evidence or both." Pet. App. 16a (emphasis added).

Although the court of appeals referred, here and elsewhere in its opinion, to manifest disregard of "the law or the evidence or both," the opinion as a whole makes clear that the court's decision to vacate the award was based entirely on the court's disagreement with the arbitrators' credibility determinations and weighing of *the evidence*, and not on any perceived refusal by the arbitrators to apply *the law*. No legal error was identified, and the court did not identify any law or legal principle that it believed the arbitrators disregarded.

Moreover, the court's decision was not based on a finding that there was no factual support for the award. In that regard, the court of appeals observed that petitioner "submitted various memoranda . . . and offered testimony by various witnesses," including the testimony of witnesses who denied making the allegedly discriminatory statements attributed to them by Halligan, and the testimony of Halligan's supervisor that Halligan had agreed to retire. Pet. App. 5a-7a. Thus, as the district

court correctly observed, "there is support for [petitioners'] argument in the record, . . . [and] there is factual support as well as legal support for the [Arbitration] Panel's ultimate conclusion". Pet. App. 33a.

The court of appeals focused, however, on what it perceived as the strength of the evidence supporting Halligan's claims (Pet. App. 15a-16a), and what it perceived as the lack of credibility of Piper's witnesses. For example, the court referred to the testimony of petitioner's witnesses as "occasionally inconsistent and ambiguous," and as having been "contradicted . . . by other Piper witnesses." Pet. App. 5a, 7a. Even more revealing is the court's statement that if the arbitrators had explained in their award that they had "credited Piper's witnesses rather than Halligan's," such an explanation "on this record . . . would have been extremely hard to accept[.]" Pet. App. 17a. Thus, the court's decision was based on its own independent examination of the arbitration record with little, if any, attention to the presence or sufficiency of evidence supporting the award, and little, if any, deference to the credibility determinations and weighing of the evidence by the arbitrators.

The new standard of review announced by the court of appeals in this case conflicts with the decisions of this Court and the courts of appeals, which have uniformly rejected invitations to review the merits of an award or to vacate an award based upon allegedly erroneous *findings of fact. See, e.g., Misco,* 484 U.S. at 36, 38-39, 44-45 ("courts are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact" and "a court may not reject [an arbitrator's fact] findings simply because it disagrees with them" or views them as improvident); *Homestake Mining Co. v. United Steelworkers of Am.,* 153 F.3d 678, 680 (8th Cir. 1998) ("We will not reconsider the merits of an award even though the parties may allege that the award rests on errors of fact") (quotation omitted); *Loughridge v. Allen,* No. 93-5099, 1994

WL 258719, at * 1 (10th Cir. 1994) (unpublished opinion) (arbitration awards are not open to review on the merits and, in reviewing an arbitration award, "we do not weigh the credibility of witnesses, assign weight to their testimony, or determine facts"); *Shelby County Healthcare Corp. v. AFSCME, Local 1733,* 967 F.2d 1091, 1094 (6th Cir. 1992) ("courts are not permitted to consider the merits of an arbitration award even if the parties allege that the award rests on errors of fact"); *Advest, Inc. v. McCarthy,* 914 F.2d 6, 8, 10 n.6 (1st Cir. 1990) ("even where [a factual] error [by an arbitrator] is painfully clear, courts are not authorized to reconsider the merits of arbitration awards"; court resisted temptation to review arbitration award as being "unfounded in reason and fact") (citation omitted); *Manville Forest Prods. Corp. v. United Paperworkers Int'l Union,* 831 F.2d 72, 74 (5th Cir. 1987) ("A court may not review the merits of an [arbitration] award—it must accept the facts found by the arbitrator"); *Amalgamated Butcher Workmen Local Union No. 641 v. Capital Packing Co.,* 413 F.2d 668, 672 (10th Cir. 1969) ("It is settled law that an award of an arbitrator . . . is not open to review on the merits . . . [a]nd it matters not that this court, if the merits of the award were open to review, might differ with the arbitrator with respect to his findings of fact") (citations omitted).

This Court and other courts of appeals similarly have held that factual findings in arbitration awards are conclusive and that a court must enforce such an award even if the court disagrees with the arbitrator's assessment and weighing of the evidence. *Farragut,* 89 U.S. (22 Wall.) at 419-21 ("Where the award finds facts it is conclusive[;] where it finds or announces concrete propositions of law, unmixed with facts, its mistake, if one is made, could have been corrected in the court below, and can be corrected here. Where a proposition is one of mixed law and fact, in which the error of law, if there be one, cannot be

distinctly shown, the parties must abide by the award"); *Remmey*, 32 F.3d at 150 (no manifest disregard where "the arbitrators had substantial conflicting testimony which could support a decision for either of the parties . . . [and] the arbitrators may well have chosen to credit evidence presented by defendants"); *National Wrecking Co.*, 990 F.2d at 961 (courts must enforce awards "even in the face of erroneous findings of fact") (citing *Northrop Corp. v. Triad Int'l Marketing S.A.*, 811 F.2d 1265, 1268-69 (9th Cir. 1987)); *News Am. Publications, Inc. Daily Racing Forum Div. v. Newark Typographical Union, Local 103*, 918 F.2d 21, 24 (3d Cir. 1990) ("An arbitral award may not be overturned for factual error, or because the court disagrees with the arbitrator's assessment of the credibility of witnesses, or the weight the arbitrator has given to testimony") (citations omitted).

The Second Circuit previously had adhered to this rule as well. *See Siegel v. Titan Indus. Corp.*, 779 F.2d 891, 892-93 (2d Cir. 1985) ("the fact that an arbitrator erroneously decided the facts" is "not a ground for vacating an arbitrator's award") (citation omitted); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 977 (2d Cir. 1974) (rejecting a request that the court review the record of an arbitration proceeding for errors of fact, the court observed that this is "a role which we have emphatically declined to assume in the past and reject once again" because "extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings") (citations omitted); *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577, 582 (2d Cir. 1967) ("it is the function neither of this court nor of the district courts to review the record of the arbitration proceeding for errors of law or fact.").

In this case, however, the court of appeals departed from decades of precedent and announced a new standard of review that conflicts with all relevant decisions of this

Court and the courts of appeals. The court cited no authority for upsetting the arbitration award based on the court's own independent review of the evidentiary record, and the SIA is aware of no such support. The decision below jeopardizes the finality of all arbitration awards and threatens the utility of arbitration as an alternative to litigation. As governing law in New York, the nation's leading financial center, the decision has the potential to create enormous mischief if it is not promptly reviewed and rectified.

D. The Absence of a Written Explanation for the Arbitration Award Does Not Support the Court of Appeals' Decision

In deciding to vacate the arbitration award in this case, the court of appeals relied in part on the fact that the arbitrators did not explain their rationale in the award. Pet. App. 16a-17a. But this Court has specifically held that arbitrators are not required to state their rationale. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (ambiguity in an opinion accompanying the award, which arguably permits an inference that the arbitrator exceeded his authority, is not a reason to refuse enforcement of the award because arbitrators have no obligation to give reasons for an award); *see Gilmer*, 500 U.S. at 31-32 (rejecting argument that absence of a written rationale precludes effective appellate review). The court of appeals' reliance on the absence of a written rationale is inconsistent with the decisions of other courts of appeals, as well as with its own prior decisions. *See, e.g., Loughridge*, 1994 WL 258719, at *1 (arbitrators are not required to explain the reasons for their award); *Eljer*, 14 F.3d at 1254 (same); *Folkways Music Publishers, Inc.*, 989 F.2d at 112 ("[A] lack of accompanying justification for the award will not render the award ambiguous or in manifest disregard of the law. Arbitrators need not give reasons for their determinations."); *see also Willemijn Houdstermaatschappij, BV v.*

Standard Microsystems Corp., 103 F.2d 9, 13 (2d Cir. 1997) (in the absence of a written opinion, "we must confirm the arbitrators' decision 'if a ground for [it] can be inferred from the facts of the case' . . . even if the ground . . . is based on an error of fact or an error of law"); *Sobel v. Hertz, Warner & Co.*, 469 F.2d 1211, 1215 (2d Cir. 1972) (there is no requirement that arbitrators state the reasons for their decision).

Unless the court of appeals' decision here is reversed, litigants seeking to vacate arbitration awards throughout the country can be expected to argue, on the authority of the decision below, that arbitrators' failure to explain their rationale can be taken into consideration by a reviewing court in deciding whether the arbitrators manifestly disregarded the law (or, under the court of appeals' new standard, the evidence). Arbitration awards, otherwise unassailable, will be called into question merely because arbitrators have not explained their decisions. Arbitrators, seeking to avoid such attacks, will be impelled to write more, with the inevitable attendant delay and expense. And, of course, any explanation that arbitrators do give will itself be closely parsed by the losing party, in an effort to identify possible grounds for undermining the finality of the award. All of this will move arbitration closer to litigation, will decrease the incentive for parties to choose arbitration in the first place, and will result in more cases being filed in the courts rather than resolved through private proceedings.

CONCLUSION

The decision below is of substantial concern to all participants in arbitration and arbitration agreements. By expanding the scope of judicial review of arbitration awards to include a review of the evidentiary record for manifest disregard of *the evidence*, the court of appeals has undermined the twin goals underlying the strong federal policy favoring arbitration—finality and cost re-

duction—and thereby created a precedent with significant legal and practical consequences for parties and courts nationwide.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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No. 98-1172

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PIPER JAFFRAY, INC. and MARVIN GEISNESS,

Petitioners,

v.

IRENE HALLIGAN, as Executrix of the Estate of
THEODORE H. HALLIGAN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners Piper Jaffray, Inc. and Marvin Geisness respectfully submit this Reply Brief in support of their petition for a writ of *certiorari* ("Pet.") to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

REASONS FOR GRANTING THE WRIT

Respondent Irene Halligan's opposition brief ("Resp. Br.") does nothing to counter the ample justification for issuance of a writ of *certiorari*. As argued in the Petition, and as amplified below, this case presents this Court with the opportunity to rectify a split among the Circuits as to the appropriate scope of judicial review of arbitrators' awards, an issue of increasing national importance in light of the longstanding federal policy favoring arbitration and the continuing trend toward the use of arbitration as a cost-effective and expeditious method of dispute resolution.

The most conspicuous feature of Respondent's brief is its intensive but highly selective focus on the particulars of Mr. Halligan's claim of age discrimination against Petitioners. Respondent goes to great lengths to argue that Mr. Halligan was, in fact, discriminated against, citing repeatedly to the evidentiary record in the case. Given the nature of this *certiorari* proceeding, it is unnecessary to dispute each of these factual points, nor will Petitioners endeavor to do so. It suffices for present purposes to state only that the facts of the case were not nearly as one-sided as Respondent portrays. Instead, there was sharp disagreement, often fundamental contradiction, on nearly every material factual issue.[1]

In her effort to demonstrate the factual soundness of the Second Circuit's decision, however, Respondent unwittingly supports *Petitioners'* position rather than her own. For in so doing, she demonstrates the extent to which the Second Circuit's decision was based on the court's disagreement with the arbitrators' resolution of the *facts*, not on any view that the arbitrators misapplied or failed to apply the *law*. In reaching that result, the court did more than simply err; it applied an altogether new approach to judicial review of arbitral decisionmaking, one that permits vacatur of rulings that reflect not just "manifest disregard of the law,"

1. By saying that the arbitration was "hotly contested," Petitioners did not imply, as Respondent apparently believes, that the proceedings were not handled with civility and courtesy on the part of all concerned. *See* Resp. Br. at 5. Rather, the point was to emphasize the persistent factual disputes that characterized the arbitration.

but "manifest disregard of the law *or the evidence or both*." Indeed, it is impossible to read the Second Circuit's decision any other way. When the court expressly acknowledged that the arbitrators had been properly advised as to the law, *see* Pet. at 15a, it implicitly eliminated the only acceptable basis for finding "manifest disregard," *i.e.*, a serious legal error. Instead, the court made clear that its holding was based on its own independent review of the factual record.

Respondent, for her part, appears to acknowledge this. In attempting to fit the square peg of the Second Circuit's decision into the round hole of the "manifest disregard of the law" standard, she is forced to argue that "arbitrators who ignore the evidence in an ADEA case perforce ignore the law." Resp. Br. at 9. The effort is wholly unconvincing. For one thing, it ignores this Court's holding in *Pullman-Standard v. Swint*, 456 U.S. 273, 289 (1982), that "discriminatory intent is a finding of fact." More broadly, the argument overlooks the Second Circuit's express articulation of its new standard: "manifest disregard of the law *or the evidence or both*." If it were truly possible, on this record, to conclude that the arbitrators disregarded only "the law" by ruling against Respondent, the court of appeals surely would have said so.

Respondent then makes the convoluted argument that disregarding the evidence is really the same as "refusing to hear evidence pertinent and material to the controversy," which is a basis for vacatur under section 10(a)(3) of the FAA, 9 U.S.C. § 10(a)(3). *See* Resp. Br. at 11-12. The argument makes no sense. Courts applying the FAA have made clear for decades that the scope of judicial review of arbitral factfinding is extremely narrow, and that the "manifest disregard of the law" standard does not permit courts to second-guess arbitrators' assessment of the facts. Not surprisingly, Respondent does not cite a single case in which a court has suggested that section 10(a)(3) (or its predecessor) permits vacatur where, as here, the court simply disagreed with the arbitrators' factual conclusions.[2] Indeed, Respondent herself sought vacatur of the award in this case under section 10(a)(3), but for

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2. The one case Respondent does cite, *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997), involved a straightforward application of section 10(a)(3): vacatur based on the arbitrators' unwarranted refusal to allow the testimony of a material witness. Nothing in the case supports Respondent's effort to equate section 10(a)(3) with the more generalized fact-based review the Second Circuit undertook in this case.

reasons completely different from her "manifest disregard" argument. *See* Pet. at 33a-36a.

With respect to the novelty of the Second Circuit's approach in this case, Respondent contends that three of the cases Petitioners cited do not "concern" the "manifest disregard" doctrine. *See* Resp. Br. at 5. Respondent is mistaken. Of those three cases, two – *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704 (7th Cir. 1994) (Posner, J.), and *Trans Chem. Ltd. v. China Nat'l Machinery Import and Export Corp.*, 161 F.3d 314 (5th Cir. 1998) (per curiam) – directly applied the "manifest disregard" standard.[3] The third, *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992 (8th Cir. 1998), did not use the "manifest disregard" articulation of the standard, but applied its functional equivalent, noting the "extremely limited" scope of judicial review of arbitral awards. *See id.* at 998 ("We may not set an award aside simply because . . . the arbitrators erred in interpreting the law *or in determining the facts*.") (quoting *Kiernan v. Piper Jaffray Cos.*, 137 F.3d 588, 594 (8th Cir. 1998)) (emphasis added).

Respondent also asserts that "[n]o other Circuit Court has permitted an arbitration award to stand where arbitrators have either manifestly disregarded the law or the evidence or both in deciding a claim in arbitration." Resp. Br. at 17. It is difficult to imagine how Respondent can make such a brazen (and unprovable) assertion. Nonetheless, Respondent has it backwards: the important point, for purposes of the instant Petition, is that no other court of appeals or district court of which we are aware has *struck down*, like the Second Circuit in this case, an arbitral award based on "manifest disregard of the evidence."[4]

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3. The Seventh Circuit in *Baravati* expressly stated that it has adopted the "manifest disregard" standard, but expressed discomfort with that nomenclature. *See* 28 F.3d at 706. It also stated, in a passage of particular relevance here, that review of arbitration awards "for clear error," *i.e.*, for mistaken factual conclusions, would be "inconsistent with the entire modern law of arbitration." *Id.* In *Trans Chemical*, the Fifth Circuit explicitly adopted sections of the district court's opinion, the pertinent passage of which noted the applicability of the "manifest disregard" standard. *See* 161 F.3d at 319 (adopting 978 F. Supp. 266 (S.D. Tex. 1997)).

4. The Second Circuit summary order appended to Respondent's brief, *Chisolm v. Kidder, Peabody Asset Management*, No. 97-7828 (2d Cir. July 28,

(Cont'd)

On another point, however, Respondent is exactly right. She states: "Petitioners cite no case in which errors in fact made by arbitrators have been deemed to be the equivalent of a manifest disregard of the evidence by any Court." Resp. Br. at 17. That is the crux of the argument in favor of a writ of *certiorari* in this case. Until this decision, no court had done what the Second Circuit did here: elevate a *factual* disagreement with the arbitrators' conclusions into a holding that the arbitrators engaged in "manifest disregard of the law or the evidence or both." That decision creates an entirely new standard of judicial review, at odds with the approach of every other Circuit, on an issue of great importance.

As to the importance of this issue, Respondent has little to say, focusing solely on Petitioners' contentions concerning the issuance of written opinions. Petitioners recognize that the Second Circuit carefully avoided setting a blanket rule that all arbitrators must issue written opinions. But its decision – that is, the language of the opinion read in light of the specific circumstances of this appeal – leaves little room for any arbitrators to conclude otherwise, at least in closely contested factual cases, lest their rulings be at great peril of vacatur. This is in itself a departure from Second Circuit precedent, under which the lack of a written opinion was cause for greater deference to the arbitrators, not less. *See* Pet. at 15-16.

In focusing on the written-opinion issue, moreover, Respondent misses the larger point. This case warrants issuance of a writ of *certiorari* not only because the Second Circuit departed from its own precedents and placed itself at odds with the other Circuits in this area. *Certiorari* is warranted because the court's decision disrupts the long-established judicial deference to arbitrators' findings of fact, and thus destabilizes the very institution of arbitration itself. In that respect, this case raises issues of true national significance. The federal policy favoring arbitration – reaffirmed by this Court earlier this Term, and declared by Congress in 1991 to apply specifically to employment discrimination cases, *see* Pet. at 17 – requires that courts not sit as super-arbitration panels. The cost- and time-saving advantages of arbitration over traditional litigation are

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1998), is, by its very terms, of no precedential value. The order states that it "may not be cited as precedential authority to this or any other court" except in limited circumstances not applicable here. *See* Resp. Br. at 1a. Respondent's thinly veiled suggestion that Petitioners somehow acted improperly in not citing it, *see id.* at 14, is thus incorrect.

rendered meaningless where the losing party gets two additional, virtually *de novo* "bites at the apple" in federal court after the arbitral decision is issued.[5]

The Second Circuit's decision presages just such a result, not only in this case but in other cases where the district court or court of appeals disagrees with the arbitrators' factual findings. Notwithstanding Respondent's attempt, particularly in her articulation of the Question Presented, to limit the effects of the court's decision to situations where employees are "required to arbitrate," *see* Resp. Br. at i, the Second Circuit said nothing to suggest that its new standard of review was limited to any particular setting in which arbitration arises. If anything, the court's opinion can be read to affect judicial review of arbitration awards in *every* context, not just in circumstances closely similar to this case. *See* Pet. at 17-18.

Nonetheless, the Second Circuit's decision strongly appears to have been colored by the panel's apparent hostility toward arbitration in general, or at least arbitration in the context of pre-dispute agreements. *See* Pet. at 9a-14a. This Court has explicitly dispensed with such notions, upholding the enforceability of pre-dispute agreements to arbitrate age discrimination claims and rejecting "generalized attacks on arbitration" as a method of resolving such claims. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). Respondent indulges in the same misconception, attempting to impugn arbitration in general by alluding to the length of the proceedings in this case. *See* Resp. Br. at 4-5. Left unstated in her argument is the unmistakable fact that the Second Circuit's decision would foster the ultimate inefficiency: forcing the parties to try this protracted case over again, based solely on the court's perception that the arbitrators reached the wrong result on the facts.

CONCLUSION

For the foregoing reasons, and for the reasons argued in Petitioners' initial brief, the petition for a writ of *certiorari* should be granted.

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5. Respondent makes the remarkable assertion that Petitioners "do not contend that the Second Circuit Court of Appeals erred in ruling that [the] NASD arbitrators 'manifestly disregarded the law' in the *Halligan* case." Resp. Br. at 7. There is nothing in Petitioners' brief that supports such a far-fetched conclusion. Suffice it to say that Petitioners do contend, most emphatically, that the Second Circuit erred.

Respectfully submitted,

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